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ABSTRACT

This report by New York's Temporary State Commission on Child Welfare discusses a study conducted to determine why the laws pertaining to freeing and placing children for adoption, and the administrative machinery implementing these laws, have failed, and to recommend remedial action. The report is divided into three major sections. Part I, The Legal Basis for Termination of Parental Rights, discusses the current statutory framework for termination of parental rights, presents a historical perspective on the development of the body of state law, sets forth major problems and issues, and states the Commission's recommendations and rationale for legislative change. Part II, The Courts, discusses the jurisdictional and administrative problems encountered within the judicial system, in administration of termination and foster care review statutes, as perceived by those consulted during the project; it also presents Commission recommendations to the State Department of Social Services and the Office of Court Administration. Part III, The Role of the Agency, details major concerns of social service personnel, attorneys, and judicial personnel and presents relevant Commission recommendations. The five appendices include a draft of proposed legislation, copies of forms and other materials developed for the study, and statistical data on agency activities in freeing and finding adoptive homes for children. (CM)

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The Children of the State

Barriers to the Freeing of Children for Adoption

FINAL REPORT

TO THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES

TITLE IV-B, RESEARCH AND DEMONSTRATION PROJECT:

Barriers to the Freeing of Children for Adoption

Submitted By:
The Temporary State Commission on Child Welfare
Hon. Joseph R. Pisani, Chairman

March, 1976

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PROJECT SUMMARY

A. Synopsis of the Problem

According to the State Department of Social Services, on December 31, 1973, a total of 48,798 children were in foster care in New York State: 28,434 in New York City; 20,364 in the rest of the State. Those among them for whom permanent family situations should, but have not been achieved, are the subject of this study.

Since 1959, New York State has enacted a series of laws that recognize the need and the right of every child for a permanent family relationship. Because many children in public care cannot be returned to their natural parents and foster care is inappropriate for them, such children must be legally freed for adoption and adoptive parents must be found for them. To this end, certain laws were enacted: 1. to terminate the relationship of a child to a parent who does not assume parental responsibility and will not voluntarily relinquish him; 2. to require the court to review periodically the status of children in public foster care and the agency's plans for achieving permanency for them; 3. to increase opportunities for adoption of all eligible children, including the older and handicapped child.

Before adoptive parents can be provided for the child who cannot be returned to his own home and who should not remain in foster care, the rights of his natural parents must be severed. Only then is he eligible ("free") for adoption. Since 1959, the major grounds for terminating parental rights have been "abandonment" and "permanent neglect."

("Mental illness" of a parent became a ground in 1973, parental "mental retardation" in 1975.) These laws allow the agency to initiate action to free the child for adoption. Because of the great number of children who remained in foster care in New York State year after year, a need was recognized for the Family Court to play a role in freeing the child from this seemingly interminable status and assist in finding a permanent home for the child - either by freeing and placing the child for adoption or by securing his return to his own home. In 1971, the 24-month foster care review law (Social Services Law, Section 392) was enacted to monitor activities of child care agencies and to permit the Court (as one of various options) to order an agency to institute proceedings to terminate parental rights. Still, relatively few children were freed for adoption. Fewer than 1,000 children throughout New York State were freed for adoption as a result of permanent neglect or abandonment proceedings from July 1, 1973 through June 30, 1974, according to the May 1975 Report, Foster Care for Children, by the Legislative Commission on Expenditure Review.

It became evident that either something was wrong with the laws or with their interpretation or implementation.

B. The Major Objectives of the Project

The Temporary State Commission on Child Welfare in this project addressed itself primarily to the statutes terminating parental rights and to their implementation. The purpose of this study on Barriers to the Freeing of Children for Adoption was to determine why the laws and administrative machinery have failed and to recommend remedial action.

Specifically, the project sought:

- to isolate the problems which are inherent in the laws and to recommend remedial legislation;
- to pinpoint the obstacles which lie within the Court system,to confer with the Office of Court Administration regarding them and to submit appropriate recommendations;
- to focus on problems for achieving permanency for children by means of the termination of parental rights and adoptive placement as described by county departments of social services and the voluntary child care agencies surveyed; and
- to convey the agencies' concerns and recommend appropriate improvements.

C. The Project's Approach

To assist it, the Commission called upon those responsible for administering or implementing the laws. Family Court judges, surrogates, administrative, supervisory and casework staffs in public and private agencies, and attorneys representing agencies, parents, and children were asked to define the problems they encountered and to recommend legislative and administrative remedies.

This was a short, concentrated study, accomplished within less than a year. It was not a theoretical study, but a practical one, based on grass-roots experience in freeing children for adoption and to a lesser degree in adoptive placement, at all levels. The material was necessarily subjective because it was derived from the participants' experience in making decisions for children. However, the study was reinforced by objective data. The essential data was gathered from seven public and 41 voluntary child care agencies. This was not, however, primarily a statistical study.

A major effort was made to get the participants to think about the underlying causes of the obstacles to freeing children for adoption - whether they be in the law, or in the reluctance to take children from their parents, or in bureaucractic red tape, i.e.,, whether the problems were legal, philosophical, or organizational.

D. Techniques of the Project

Seven social services districts were selected for the study: the Counties of Erie, Monroe, Onondaga, Suffolk, Westchester, and Chemung and New York City. These districts represent major urban counties and suburban communities of the State and give representation to smaller community problems. The counties selected had 36,963 children in foster care at the end of 1973 (75 per cent of all children in foster care in New York State). For statistical comparison purposes, the base population for the study is 24,687, which represents the children in foster family homes and agency-operated boarding homes in 1973 in the districts surveyed, children on whose behalf agency efforts toward terminating parental rights generally had been concentrated.

The cooperation of the Office of Court Administration and of the State Department of Social Services was obtained in order to encourage the cooperation of their constituencies as well as to ensure their consideration of the recommendations that would result from the study.

Project staff made personal visits to seven public departments of social services as well as 16 child care agencies in New York City. The New York City voluntary agencies visited were those most representative of the child care community in terms of size, religious affiliation, activities in terminating parental rights, and other significant factors. In each social services district, meetings were convened with the key individuals responsible for making decisions for children in public care: Family Court judges; administrative, supervisory, legal and casework staffs of the public departments of social services (and child care agencies in New York City); lawyers from the agencies and those representing parents or children, (e.g., legal aid societies and neighborhood legal services).

In assembling its data, the study made use of a data collection form, questionnaires and discussion groups. Questionnaires, agendas and issue papers (sent in advance) provided the basis for group discussions. The questions in the three outlines for interviews (Family Court judges, agency supervisors, caseworkers) were developed from interviews with recognized authorities on New York State's adoption laws, and on child welfare agencies.

The meetings of judges were chaired by Administrative Judges of the Family Court; the agency discussions by the Project Research Associate. The two group meetings of child welfare attorneys and attorneys for parents or children in New York City were chaired by the Chief Counsel of the Commission.

Included in those who participated were 49 Family Court Judges from six counties and the City of New York, about 200 administrators, supervisors and caseworkers from seven public departments of social services and 16 New York City voluntary agencies, 12 county attorneys, 30 New York City child welfare attorneys and 16 New York City attorneys representing natural parents and/or children.

The Survey Form on Legal Barriers to Adoption was sent to seven public departments of social services and to 84 voluntary child care agencies in New York City.* The purpose of this form was to gather data on:

1. the number of termination proceedings initiated and voluntary surrenders obtained in 1973;
2. the number of children freed by May, 1975 as a result of the 1973 termination procedures;
3. the number of children adopted by May, 1975 based on the 1973 termination procedures;
4. agency recommendations on foster care reviews in 1973;
5. court orders on foster care reviews in 1973;
6. agency compliance with these court orders;
7. personnel specializing in procedures related to the freeing of children for adoption, and
8. adoption services personnel.

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*Those voluntary agencies not personally visited were sent an additional survey form.

Five county departments of social services and 41 New York City voluntary agencies provided all the data requested. (An additional 27 voluntary agencies responded that all the data requested of them was either inapplicable to their agencies, or that they were unable to respond and sixteen voluntary agencies did not return the survey.) The New York City and Erie County Departments of Social Services were unable to provide the data on foster care reviews. Project staff assembled and reviewed a random sample of the Court and agency records on 1973 foster care reviews in these two counties, which was then incorporated into the study's statistical findings.

A series of working papers was prepared summarizing the data and the views of the participants. These working papers became the basis for legislative recommendations as well as recommendations to the State Department of Social Services and the Office of Court Administration.

The project recognized certain limitations. In particular the only voluntary child care agencies consulted were those in New York City which care for 89% of New York City's children in foster care (in contrast with 21% of upstate counties' foster children cared for by voluntary agencies outside New York City). In upstate localities, attorneys were interviewed individually; only in New York City did staff obtain thoughts of the attorneys on a collective and reactive basis.

E. Recent Developments

In the course of any investigation, changes occur, partially as a result of the questions raised; this study was no exception. Prior to the project, there was major public concern over the inability of the child welfare agencies to achieve a permanent family status for children in their care. Yet, as a result of the efforts of many persons and organizations, attitudes and, more significantly, laws changed.

The Temporary State Commission on Child Welfare was in the forefront of this legislative change. At its behest, and that of the Chairman, Senator Joseph R. Pisani, nineteen laws affecting children, ten of which relating to adoption and termination of parental rights, were enacted in the 1975 Legislative Session. The major substantive changes in these laws were:

-- clarification of the Legislature's intent that, contrary to case law, as promulgated by the State Court of Appeals, a flicker of interest in the form of the parent's insubstantial or infrequent contact with a child, should not be sufficient basis for the denial of an abandonment or permanent neglect petition. (Chapter 704 of the Laws of 1975).

-- Change from the statutory standard of "moral and temporal interests of the child", to "the best interests of the child", as the guiding criterion in making an order of disposition in a permanent neglect proceeding with the additional requirement that "there shall be no presumption that such interests will be promoted by any particular disposition". (Chapter 701 of the Laws of 1975).

-- The addition of mental retardation of the parent as grounds for terminating parental rights. (Chapter 706 of the Laws of 1975).

-- Reduction of the time period from 24 to 18 months for the initial foster care review and the raising of the upper age limit from 16 to 18 for the children to be reviewed. (Chapter

708 of the Laws of 1975).

-- A requirement that the Court in a foster care review order of disposition state its findings supporting its determination that, its order is in the child's best interests. (Chapter 342, Laws of 1975).

In passing legislation which became Chapter 701 of the Laws of 1975, noted above, the Legislature's target was the judicial interpretation that the continued strength of the parent-child relationship required a presumption that the child's well being is best served if cared for by the parent. In May 1974 the New York State Court of Appeals had ruled in _Susan W. et al. v. Talbot G._, 34 N.Y. 2d 76, that although the flame of parental interest had been reduced to a "flicker", the Court could not sever parental rights.

Following approval of Chapter 701 of the Laws of 1975 the Court of Appeals in October of that year again addressed the issue in _Ray A. M. (Anonymous) et al. v. The Spence Chapin Adoption Service_. The Court concluded that the child care agency had made diligent efforts to restore the relationship but failed because of the parent's"persistent neglect" and "pattern of intransigence, instability and abusive conduct towards her child." Quoting Chapter 701 of the Laws of 1975, the Court determined that "the 'best interests' of this permanently neglected child require a termination of parental custody." In weighing the equities the Court ruled that the child's rights must prevail.

The agencies too, have signalled that they are working with renewed intensity towards achieving a permanent home for each child in their care through initiation of proceedings to terminate parental rights. On a statewide basis, agencies filed 440 permanent neglect petitions in the first six months of 1975 as compared with 613 during the preceding 12 months. Onondaga County's 30 termination petitions, and Westchester County's 47 petitions during this six month period are in sharp contrast to the three and seven petitions respectively filed in those counties during 1973.

New York City's Special Services for Children (S.S.C.) has made greater efforts to protect parents' rights and hasten the process of freeing a child once a decision has been made that parental rights must be terminated. It established a Parent's Rights Unit and revised its Authorization of Placement form to clearly describe the responsibilities of the parent and of the agency. A new document, titled Manual for Parents of Children Placed in Foster Care was prepared by Special Services for Children. Finally, S.S.C. has revised its planning forms to assist child care agencies in developing concrete plans for children in foster care. S.S.C. also has discontinued the practice of approving the voluntary agency legal documentation of a decision to free a child for adoption - a practice that had been responsible, in part, for unconscionable delays in the voluntary agencies' initiation of proceedings to free a child even after they had been ordered to do so in a foster care review hearing.

Further, new efforts have been demonstrated by voluntary agencies in informing parents of their rights and obligations while their children are in foster care. For example, the Jewish Child Care Association recently published an explanatory guide for parents entitled, "Your Child in Foster Care."

F. Organization of the Report and Summary of Recommendations

The Commission's Report is divided into three major sections: Part One, titled "The Legal Basis for Termination of Parental Rights" discusses the current statutory framework for termination of parental rights, presents a historical perspective on the development of that body of State law, sets forth the major problems and issues raised, and the Commission's recommendations and rationale for legislative change.

Part Two of the Commission's report, titled "The Courts", discusses jurisdictional and administrative problems encountered within the judicial system, in administration of termination and foster care review statutes, as perceived by those consulted during the project and presents Commission recommendations to State DSS and the Office of Court Administration.

Part Three, titled "The Role of the Agency", details major concerns of social service personnel, attorneys and judicial personnel and presents relevant Commission recommendations.

Following the body of the report are five Appendices which present: a draft of proposed legislation (Appendix I); statistical data, including a brief summary analysis (Appendix II); a report prepared for the Commission under this project by Dr. Trudy Bradley Festinger titled Children in Foster Care: The Impact of Review by the Family Court (Appendix III); survey forms used during the project and a listing of New York City voluntary agencies responding to the project surveys (Appendix IV); and correspondence received from the Executive Committee of the State's Surrogate's Court Association expressing its position on questions of expansion of the jurisdiction of Surrogates over matters of termination of parental rights (Appendix V).

In offering its recommendations for statutory and administrative changes, the Commission is fully cognizant that it is not proposing a panacea for all child welfare problems. Freeing children for adoption is a commendable goal when applied to those children on whose behalf termination action and adoption is appropriate. However, the Commission acknowledges that foster care accompanied by necessary supportive services for children and their families is often the most appropriate and feasible plan for many children.

Further, once a child is legally freed for adoption extensive efforts must be made by public and private agencies to facilitate adoptive placement. Problems in and obstacles to adoptive placement, subjects beyond the scope of this study, are part of Commission projects this year under a grant from the Edna McConnell Clark Foundation.

The following is a brief summary of the Commission's recommendations under each part of this report.

1. Statutory Changes

The Commission recommends a fundamental recodification of virtually all grounds for termination of parental rights under a single statute,a proposed §384-b of the Social Services Law, which, in effect, makes the Department of Social Services, for the first time, the single public agency responsible for supervision of all agency termination proceedings. This proposal incorporates,for the first time, a statement of legislative findings and intent to provide clear evidence to the Courts of the Legislature's awareness of the need for procedures to free children for adoption, and to clarify that the Legislature's paramount concern in establishing such procedures is the promotion of the best interest of children.

The proposed termination statute retains separate grounds for termination of parental rights (abandonment and permanent neglect) but clarifies the distinctions between such grounds as well as crucial concepts (such as the phrases "contact" and "plan" under the Permanent Neglect Law).

With respect to Domestic Relations Law provisions governing required consents to adoption, anachronistic and antiquated provisions have been deleted, appropriate conforming (to the new proposed termination statute) changes are made and a new appropriate definition of and criteria relating to grounds for dispensing with adoption consents are added as they will especially apply to independent or private placement adoptions.

The Commission's bill recommends a major new ground for permanent termination of parental rights - that of severe and repeated child abuse. It also precludes the use of the criterion of a child's "adoptability" in judicial decisions to terminate parental rights.

The Commission's bill assists attorneys and judges by setting forth procedural guidelines to be followed under the new termination statute and extends to termination, foster care review and custody proceedings the principles of non-confidentiality of certain normally privileged evidence.

With respect to judicial review of children in foster care, the proposed statute seeks to reduce judicial caseloads by excluding children already freed for adoption from the purview of periodic court review, and establishes standards to guide the court in determining whether to direct that proceedings be initiated to free children for adoption.

The substance of the Commission's many statutory recommendations are comprehensive and lengthy. They represent a unified approach and solution to highly complex problems and issues which constitute barriers to achieving permanency for children.

2. The Courts

The Commission recommends that:

(a) The current jurisdictional distinctions between Family and Surrogate's Courts over termination proceedings should be retained.

(b) The State Department of Social Services, in consultation with the Office of Court Administration and the Family Court Advisory and Rules Committee, should design a standard investigation form for use by all agencies in providing information at foster care review hearings.

(c) Family Court judges should be more diligent in complying with Chapter 342 of the Laws of 1975 (noted above).

(d) OCA and State DSS should discuss the best methods for improved monitoring of agency compliance with judicial foster care review orders.

(e) Judges should greatly restrict the practice of prolonging foster care review by issuing a series of time consuming orders and requesting a series of follow-up reports.

(f) OCA and State DSS should sponsor joint meetings of judges, attorneys and social services agency staff in order to develop greater interprofessional respect and cooperation.

(g) Consideration should be given to its proposal (Senate bill 5251, Assembly bill 8317 of 1975-76) to require the appointment of a law guardian to represent the child in a foster care review proceeding.

(h) The period of time Family Court judges remain at one assignment in New York City should be substantially increased, thereby reducing delays in adjudicating termination of parental rights and foster care review cases caused by rotation.

(i) Conscientious implementation of the Standards and Goals of the Administrative Board of the Judicial Conference should be pursued as they apply to problems of excessive adjournments found in the New York City Family Court.

(j) Attorneys for agencies in New York City should make fuller and freer disclosure of case records in the spirit of the Carla L. case. If practices are not improved voluntarily, the Commission will recommend a legislative remedy.

(k) Long-hearing parts should be used in the New York City Family Court for termination cases to the extent resources permit and can be made available.

(l) Further efforts should be made by OCA to inform Family Court judges in a timely fashion of statutory changes affecting foster care, adoption or termination of parental rights.

3. The Role of the Agency

The Commission recommends that:

(a) State DSS should undertake a detailed study of visitation by natural parents of children in foster care. Following this, DSS in consultation with appropriate public and voluntary child care agencies, should promulgate regulations setting forth, among other things: a minimum periodicity of visitation, how visitation may be encouraged, and conditions under which visitation may be stopped. Such regulations should contain sufficient flexibility to be responsive to individual situations, and also should provide for a uniform state policy on reimbursement for parental transportation costs as well as inclusion in agency case records of a record of parental visits.

(b) The written agreement for placing a child in foster care should include specifics on periodicity of visitation and a statement of parent and agency responsibilities for visitation and the consequences of parental failure to visit. This agreement should be explained and put in the court record at the Judicial "358-a" hearing.

(c) State DSS should develop guidelines within the "diligent efforts" requirement of the permanent neglect statute, on casework and other services to be provided to families of children in foster care. These guidelines should spell out circumstances when efforts to re-establish the parent-child relationship would not be in the best interest of the child within the meaning of that statute.

(d) The role, rights and obligations of parents and agency to work together to plan for the child should be spelled out in the written agreement for placing the child in foster are and read into the Court record at the "358-a" hearing. This agreement should also inform the parent of his obligation to keep the agency apprised of his current address and should impose obligations on the agency, when the parent phones or visits, to inquire as to the parent's current address.

(e) State DSS should assure that up-to-date service information and referral resources are available to local agency personnel. Within available funds, additional emphasis should be placed on development of training opportunities for social services personnel, particularly under Title XX of the Federal Social Security Act.

(f) State DSS should review the basis for current foster care reimbursement rates in order to encourage agency services to reunite families.

(g) State DSS should work with New York City Special Services for Children to review reported difficulties in administration and coordination of service delivery.

(h) State DSS should develop criteria and promulgate guidelines to assist agency personnel in making decisions on permanent planning for children.

(i) State DSS should work with New York City SSC to ease procedural delays and other administrative problems relating to SSC supervision of voluntary agency planning for children.

(j) State DSS should sponsor demonstration projects to assess the impact of various planning techniques, the use of specialized staff and methods of management control.

(k) State DSS should encourage, where child welfare legal caseloads so merit, the establishment of welfare attorney positions in local departments of social services.

(l) State DSS should develop training programs to teach caseworkers fundamental provisions and principles of law, including the constitutional concept of "due process", the law of evidence and related matters, so that caseworkers may better understand theirs'and others'roles and responsibilities in the process of terminating parental rights. State DSS should also prepare and up-date for agency staff, a compendium of child welfare laws, and interpretations of court decisions.

(m) State DSS should provide for the development of better, more standardized and less time consuming agency case records to serve the dual purpose of determining need for services as well as providing a basis for evidence in judicial proceedings.

(n) New York City should review the necessity of maintaining its present practice of providing for the representation of the Corporation Counsel at termination and foster care review proceedings brought by voluntary agencies(which are often represented in such proceedings by their own attorneys).

(o) State DSS should review local agency organization, caseload, and staffing patterns and, within funding limitations, encourage those most productive for the freeing of children for adoption and for the placement of such children in adoptive homes.

(p) State DSS should meet with the State Department of Civil Service to review and revise standards for the selection of caseworkers and develop a separate testing device for child welfare workers.

(q) State DSS should consult with schools of social work to determine the need for additional formal graduate training for child welfare workers.

(r) State DSS should clarify existing adoption subsidy regulations to eliminate difficulties encountered in their implementation and State DSS should work with New York City SSC to resolve reported delays in approval of subsidy applications.

PART ONE

THE LEGAL BASIS FOR TERMINATION OF PARENTAL RIGHTS

I. The Current Statutory Framework

Summary

Parental rights may be terminated, thereby severing the parent-child relationship and freeing the child for adoption, by the following methods:

(a) The parent may voluntarily relinquish ("surrender") the child to an authorized agency (Social Services Law, Sections 384, subdivisions 1-5);

(b) Parental rights may be judicially terminated prior to an adoption proceeding upon a finding that:

  (i) the parent abandoned the child (Social Services Law, Section 384, subdivision 6),

  (ii) the parent is mentally ill (Social Services Law, Section 384, subdivision 7),

  (iii) the parent is mentally retarded (Social Services Law, Section 384, subdivision 7), or

  (iv) the child is a "permanently neglected child" (Family Court Act, Article 6, Part 1);

(c) Parental consent to the child's adoption is rendered unnecessary at the time of the adoption proceeding upon the grounds that parental rights have been previously terminated by one or more of the above methods, or upon various other grounds which are described in Section 111 of the Domestic Relations Law and which will be discussed hereinafter in greater detail.

A. Voluntary Surrender

Section 384, subdivisions 1-5, of the Social Services Law authorizes a parent to voluntarily commit the guardianship and custody of his child to an authorized agency by signing a written instrument, known as a "surrender". The terms (purpose, duration, conditions) of the instrument are agreed to by the parent and by the agency. If the parent is surrendering the child for adoption (which is generally, but not necessarily the case, as will be discussed later in this report), the written instrument must state this, and in such event the parent may waive the right to any notice of adoption and authorize the agency to consent to the adoption in his place and stead. The instrument must be signed, acknowledged or witnessed, notarized and recorded. A Surrogate or Family Court judge may approve the surrender, but such judicial approval is not required in order for the surrender to be valid.

If the surrender instrument so recites, the parent can institute a proceeding to have the Court set aside the surrender, unless the child is in the home of an adoptive parent and 30 days have elapsed since the signing of the surrender, or unless the purpose of the proceeding is to vest the child's custody in another person. The prospective adoptive parent of the child has a right to intervene in any such proceeding, as does a foster parent who has cared for the child for a period of 24 months.

B. Abandonment

The Family Court and Surrogate's Court have concurrent, original jurisdiction over proceedings, pursuant to Social Services Law, Section 384, subdivision 6, to terminate parental rights upon the ground that the parent has abandoned the child. Social Services Law, Section 371, subdivision 2, defines an "abandoned child" to include a child whose parent or legal guardian has left hime (a) in destitute circumstances or (b) without proper food, shelter or clothing, or (c) without visiting him or without making payments toward his support, for a period of six months, without good reason. The judge or surrogate has discretion as to who shall receive notice of the proceedings and how notice shall be served. Pursuant to Family Court Act, Section 262, the parent has the right to counsel and, if indigent, the right to have an attorney assigned by court in such proceedings. No similar provision exists in the Surrogates Court Procedure Act.

C. Mental Illness or Mental Retardation

The Family Court has exclusive, original jurisdiction over proceedings, pursuant to Social Services Law, Section 384, subdivision 7, to terminate parental rights upon the ground that the parent is mentally ill or mentally retarded. Each of these terms is defined in two parts: the parent's condition, and its effect on the well-being of the child if he is returned home. "Mental illness" is defined as "an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment...". "Mental retardation" is defined as "subaverage intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior..." To this extent, the definitions derive from corresponding definitions in the Mental Hygiene Law. The Social Services Law definitions, however, go further by including a definitional element that the child would be endangered if he were returned home. The test to be applied is worded differently, but is substantially the same, in both of these grounds for termination of parental rights. In the case of mental illness, the issue raised is whether the child's "physical, mental or emotional well being would be endangered" by his return home; in the case of mental retardation, it is whether "the child would be in danger of becoming a neglected child, as defined in the Family Court Act".

Additional requirements for the termination of parental rights on these grounds are a) that for the present and foreseeable future, the parent will not be able to provide adequate care for the child by reason of mental illness or mental retardation, b) that the best interests of the child require transfer of guardianship and custody of the child from parent to agency, and c) that the child has been in the care of an authorized agency for at least one year.

Notice of the proceeding is made by service of process, in accordance with Civil Practice Law and Rules, Section 308, upon the parent and upon other persons in the judge's discretion. The parent has a right to counsel, and where indigent, to court-appointed counsel.

The judge is required to cause the parent to be examined by a psychiatrist (if mental illness is alleged) or by a physician and a certified psychologist, in the case of mental retardation. Such professionals are to be appointed by the Court pursuant to Section 35 of the Judiciary Law. These experts are required to present testimony in court on the parent's condition, including the parent's ability now and in the foreseeable future to be able to care for the child. The parent and the authorized agency are permitted to submit other medical, psychiatric or psychological evidence. The standard of proof is "clear and convincing evidence" -- a higher evidentiary standard than that required in other termination proceedings. The evidentiary rules restricting the disclosure of certain privileged communications, such as those between physician and patient or social worker and client are inapplicable in termination proceedings on grounds of mental illness or retardation.

D. Permanent Neglect

The Family Court Act, Article 6, defines a "permanently neglected child" as one under 18 who has been placed in the care of an authorized agency and whose parent(s),although physically and financially able to do so, have failed over a period of at least one year (since the child came into care) to maintain substantial, continuous or repeated contact with the child, or to plan for his future. This failure must have occurred despite the agency's diligent efforts to encourage and strengthen the parental relationship, and such diligent efforts by the agency must be made if they "will not be detrimental to the moral and temporal welfare of the child."

The Family Court has exclusive jurisdiction over permanent neglect proceedings. Such proceeding may be initiated by an authorized agency, or by a foster parent if the court ordered the agency to institute termination proceedings at a foster care review hearing (see discussion of Social Services Law, §392, below) and if, after thirty days, the agency failed to comply. The petition must allege facts constituting permanent neglect of the child and that the child's best interests require permanent termination of parental custody.

The parent is entitled to legal representation and, if indigent, to an attorney assigned to him by the Court (Family Court Act, Section 262). The child is represented, if at all, by the law guardian, but appointment of a law guardian in this proceeding is a matter of judicial discretion.

Two hearings are required. First, a fact-finding hearing is necessary to establish permanent neglect, on the basis of competent, material and relevant evidence. Immediately thereafter, or at a later date, a dispositional hearing is held which may result, on the basis of material and relevant evidence, in an order terminating parental custody, suspending judgment or dismissing the petition. The standard of proof at the fact-finding hearing is a "fair preponderance of evidence." An order of disposition must be made "solely on the basis of the best interests of the child, and there shall be no presumption that such interests will be promoted by any particular disposition."

E. Dispensing With the Need for Consent to Adoption

Domestic Relations Law, Section 111, states whose consent to the child's adoption is required. It provides that consent is required of:

- the adoptive child who is over 14 years of age unless the judge or surrogate decides to dispense therewith;
- the parents or surviving parent (adult or minor) of a child who is born in wedlock;
- the mother (adult or minor) of the child who is born out of wedlock; and

- any person or authorized agency who has the lawful custody of the adoptive child.

If the child is over 18 years of age, the parent's consent is not required and the Court may dispense with the need for consent of another person or agency having custody of the "child".

The law further specifies that parental consent is not required of the parent:

- deprived of guardianship under Social Services Law, Section 384;
- who has surrendered the child to an authorized agency for the purpose of adoption;
- who has abandoned the child;
- who is insane or judicially declared to be incompetent, or who is mentally retarded as defined by the Mental Hygiene Law;
- judicially deprived of custody on the grounds of permanent neglect;
- judicially deprived of custody on the grounds of cruelty or neglect;
- adjudged to be a habitual drunkard;
- deprived of civil rights, although a parent deprived of civil rights must be given notice of the adoption proceeding. An opportunity to be heard may, in the discretion of the judge or surrogate, be afforded to any parent notwithstanding the obviation of the need for his consent to the adoption.

F. A Related Statute - Periodic, Judicial Foster Care Review

Section 392 of the Social Services Law provides a mechanism for judicial(Family Court) review of the foster care status of three categories of children under the age of 18 years: those whose guardianship and custody have been committed to an agency by Court order or by surrender instruments pursuant to Section 384; those whose custody have been transferred to an agency upon a finding of permanent neglect; and those whose care and custody have been transferred to an agency by a parent or guardian through an instrument executed pursuant to the provisions of Section 384-a of the Social Services Law.

The agency caring for a child in one of these categories must petition the Family Court requesting that the Court review the child's foster care status, when the child has remained in continuous foster care for eighteen months. The Court is required to make an order of disposition based upon the child's best interests and to include therein its findings supporting its determination that the order is in accordance with such interests.

The Court has various alternatives available to it in entering its order: a) in any case, it may direct that foster care be continued; b) in the case of a child who has been temporarily transferred to the care of the agency, it may direct that the child be returned to his parent, guardian or relative or may direct that the agency institute a proceeding to free the child for adoption; or c) in the case of a child whose guardianship and custody have been committed to the agency pursuant to Section 384 (i.e., who is already legally freed for adoption), it may direct that the child be placed for adoption.

Notice of the hearing is sent to the parent or legal guardian, the foster parent, the agency caring for the child, and the supervising agency (if different from the child care agency). The notice must also indicate the dispositional alternatives available to the Court. Both parent and foster parent have the right to counsel and, if indigent, the right to court-appointed counsel. The Court may dispense with the hearing (if everyone consents) and reach a decision on the basis of materials and affidavits. If the Court directs that foster care be continued, the child's status is subject to subsequent rehearing,at least within two years.

II. A Historical Perspective - The Courts and the Legislature

The statutory framework described above did not result from a single act, or even a planned series of acts of the Legislature. Rather, it is the curious manifestation of an evolutionary (in some instances, perhaps, nearly revolutionary) process of change in social and psychological theory, and, more importantly, of judicial interpretation and legislative reaction thereto.

Prior to 1959, abandonment was the only major ground upon which a child could be freed for adoption without the parent's consent (other grounds, seldom used, included insanity and mental deficiency). The definition of an abandoned child (Social Services Law, Section 371, subdivision 2), aside from clear situations involving children left destitute without food or shelter, or having no contact at all with the parent for over a year (this period was changed to six months in 1969) was patently inadequate in most cases. A body of case law had developed beginning in 1924 with Judge Cardozo's decision in Matter of Bistany, 239 N.Y. 19, 24, which required proof of "acts so unequivocal as to bear one interpretation and one only the parents manifested an intention to abandon the child forever". During the ensuing years, this demanding interpretation was repeated in various forms and with varying phraseology in a line of case law. (See, for example, Judge Fuld's decision in Matter of Maxwell, 4 N.Y. 2d 429, 433, in which the Court of Appeals required proof of"a settled purpose to be rid of all parental obligations and to forego all parental rights".)

Perhaps in part as a result of this strict and subjective test of abandonment, a legislative solution (palliative, if not panacean,in nature) was proposed and adopted in 1959.

In that year the concept of "permanent neglect" was enacted. This law also reflected increasing concern about the interests of the child as distinct from those of the parent, and about the child's right to a normal, permanent family life. Governor Rockefeller, in approving the new permanent neglect law, said, "A great many children are doomed to grow up in institutions or foster homes at public expense and are prevented from forming normal, lasting family relationships, because minimal contacts between a parent and child...act as a bar against a judicial finding that the child has been abandoned."

This new ground for terminating parental rights provided that the criterion that was to guide the judge was whether terminating parental rights was "in the moral and temporal welfare" of the child. Moreover, in the view of Shad Polier, Esq., one of the architects of this legislation, "the court must be further satisfied that its adjudication is but a step toward providing the child with another, and an adequate set of parents through adoption." This was implicit in a simultaneous amendment to the Domestic Relations Law, Section 111, providing that consent to the adoption of a child was not required of a parent who had been judicially deprived of the child on grounds of permanent neglect.

The permanent neglect law (Chapter 450 of the Laws of 1959) was widely supported by judicial and bar groups, professional organizations in child welfare, social welfare agencies, adoption agencies, and civic groups which predicted that it would assist in alleviating the plight of hundreds of children in foster care. Two cautionary notes, however, were sounded which were to prove prophetic. One agency, although supporting the bill, questioned whether any substantial number of children would be helped by it. The Committee on Domestic Relations Courts of the Association of the Bar of the City of New York, while agreeing with the objective of the bill, disapproved of its form, maintaining that "the use of such phrases as 'failed...to maintain contact with and plan for the future of the child'...do not provide an adequate guide to either the agencies, the parents or the court as to circumstances warranting an adjudication of 'permanent neglect'."

In 1969 the period of abandonment was shortened from one year to six months before a proceeding for guardianship and custody could be commenced (Chapter 640 Laws of 1969). Introduced by the Joint Legislative Committee on Child Care Needs, the bill received wide support on the grounds that it is in the best interests of the child to free him for adoption as early as possible. It was felt that parental rights were still adequately protected by the requirement that parental failure to visit or support the child must occur without good reason." One agency that opposed the amendment noted the difficulty of proving "intent" to abandon in six months and considered that the advantages to be gained from the shorter period were minute compared to the possibility of taking a child away from a deserving natural parent.

In referring to the 1969 amendment Surrogate (and former Family Court Judge) Millard L. Midonick wrote: "At long last we see the Legislature coming to grips with the basic conflict between parental rights and infant's rights. Too often a preoccupation with parental rights tends to blur the essential right of an infant to end the limbo of foster care (or shelter boarding home care) and secure a permanent parental home either with his natural or adoptive parents. Parental rights must not be emphasized to the point of denying the child a parental home." (*Matter of Jennifer "S"*, 69 Misc 2d 942, 946, Surrogate's Court, New York County.)

Chapter 901 of the Laws of 1971 amended the "diligent efforts" clause of the permanent neglect statute. Introduced at the request of the New York State Department of Social Services, it retained the diligent efforts requirement, but only where such efforts would not "be detrimental to the moral and temporal welfare of the child." The agency would have to specify in a permanent neglect petition its reasons for not working to restore the parent-child relationship if it had failed to do so. This amendment was responsive to a decision by Family Court Judge Justine Wise Polier denying a petition of permanent neglect, because the agency had not worked with the parent, although testimony indicated such efforts would have been harmful to the child (*Matter of Clear*, 65 Misc. 2d 323, Family Court, New York County).

Commenting on this 1971 statute, Family Court Judge George J. Follett stated: "It constitutes one more step which the Legislature has taken in the direction of ensuring that children will be given the opportunity to grow up in homes where they will receive good care together with the sense of belonging and being loved that is essential to healthy development" (*In re Raymond M.*, 81 Misc 2d 70, Family Court, St. Lawrence County).

Two years later another amendment was made to the provisions of the permanent neglect law: by Chapter 870 of the Laws of 1973, the parental responsibility to "maintain contact *and* visit" was changed to "maintain contact *or* visit." (emphasis added)

From 1971 onwards, the Legislature amended the child welfare laws repeatedly, reaffirming its intent that children have normal family lives in permanent homes. In part these amendments were in response to the insubstantial number of children who were being freed for aodption, and to continued judicial rulings that stressed the rights of parents.

In 1971, the Legislature enacted Section 392 of the Social Services Law (described above) providing for periodic Family Court review of the foster care status of children. This enactment dramatically changed the role of the Family Court and, parenthetically, has also induced a reexamination of the values of society on basic issues which the Court confronts in its responsibility concerning children.

The enactment of Section 392 was accomplished over the virtually unanimous protestations of child care agencies and social services officials throughout the State. It made the Court an instrument of accountability in this State, necessitated in part by the failure of social services agencies to effectively monitor the progress of children in their care, and gave added meaning and dimension to the time-honored concept of "parens patriae".

Explicit new grounds for terminating parental rights were added in 1973 (Social Services Law Section 384, subd. 7) for reasons of parental mental illness by Chapter 863, and in 1975 for reasons of parental mental retardation by Chapter 706.

Meanwhile, foster parents have been receiving greater rights, particularly those who have had the care of a child for two years or more, and who were therefore seen as potential adoptive parents. In 1969 such foster parents were given priority for consideration as adoptive parents by the addition of Section 383, Subdivision 3 of the Social Services Law. In 1972, this Section was amended by Chapter 645 to authorize such foster parents to intervene in custody proceedings and in proceedings to set aside the voluntary surrender of a child, while the foster care review law gave them standing to initiate a termination proceeding where the agency had failed after thirty days to comply with a court order to do so. Similar standing was extended to foster parents in proceedings to extend or continue the placement of an abused or neglected child, by the enactment of Chapter 220 of the Laws of 1975.

A critical change in the balance between parental rights and children's best interests occurred in 1972. By Chapter 639 of the Laws of 1972, the Legislature explicitly stated that the Court's decision in certain custody disputes shall be made "solely on the best interests of the child and there shall be no presumption that such interests will be promoted by any particular...disposition." At issue here were the rights of natural and adoptive parents in proceedings for the custody of a child surrendered for adoption or proceedings to set aside a surrender. (Social Services Law Section 383 Subd. 5 and Domestic Relations Law Section 115-b). In 1975, Chapter 701 used essentially the same language in an amendment to the permanent neglect statute, to guide the judge in the dispositional hearing (Family Court Act Section 631).

As previously indicated, the Legislature enacted the permanent neglect part of the Family Court Act as a partial solution to the problems raised by the Cardozo concept of abandonment. But, if any observer harbored doubts that this concept was still very much alive in the State of New York, this illusion was dispelled when the Court of Appeals handed down its decision in May, 1974 In the Matter of Susan W. v. Talbot G., 34 N.Y. 2d 76. Citing the Cardozo decision in Matter of Bistany, supra, the Court thereupon enunciated a new variation on the theme by adopting the so-called "flicker concept". Speaking for the Court, Judge Gabrielli said, "Even where the flame of parental interest is reduced to a flicker the courts may not properly intervene to dissolve the parentage." The Court also stated that the parent's "communications with his children, sporadic and infrequent as they were, evinced that modicum of attention sufficient to defeat petitioner's burden of proving abandonment." (emphasis added) 34 N.Y. 2d 50.

The response of the State Legislature was not long in coming; at the request of the Temporary State Commission on Child Welfare, it enacted Chapter 704 of the Laws of 1975 which amended provisions of law relating to both abandonment and permanent neglect to provide that"...evidence of insubstantial and infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a finding that such parent has abandoned such child" (or that such child is a permanently neglected child). The Legislature, as indicated in the bill sponsors' memorandum, established the doctrine that "where parental interest lacks substance, parental rights ought to be terminable in the best interests of the children."

III. STATUTORY ISSUES AND PROBLEMS

A. Introduction

The foregoing has described the present law of the State of New York, its evolution and intent. It demonstrates the growing concern of the Legislature and Judiciary over the deleterious effects on children of long-term foster care and, also, an intent to facilitate the freeing of children for adoption. Notwithstanding this concern and intent, this Project found that in 1973 when there were nearly 25,000 children in foster family homes and agency boarding homes, among the agencies studied, only about 1,000 court proceedings to terminate rights were begun that year, of which 300 were permanent neglect petitions and 700 abandonments. (see Tables 1 and 2 in Appendix II)

In order to ascertain whether and how our statutes were inadequate and why there has been relatively little use of proceedings to terminate parental rights where appropriate, the Project staff interviewed judges, social agency staff and attorneys. They were asked to describe their perception of the problems in freeing children, and the factors, whether in the statutes or in their implementation, that facilitated or hindered this. They were also asked to recommend both legislative and administrative remedies where appropriate.

This section of the Report will describe the various statutory issues and problems presented, the Commission's recommendations relating thereto and the rationale underlying the recommendations. In reaching its conclusions, the Temporary State Commission on Child Welfare considered the views of those with direct experience in caring for children in public care, in pleading for them, and in ruling on their future. Its decisions have been based less on theoretical doctrine than on this array of practical experience with the workings of the current laws terminating parental rights.

The Commission has found that the current system (interaction of the courts and child welfare agencies) has substantial inadequacies that are harmful to the well-being of children. Insofar as these shortcomings are due to the laws themselves, it proposes amendments to statutes to remedy them. (Administrative and other recommendations are presented later in this Report.)

The Study concludes that some widely accepted principles underlie the observations and recommendations of these practitioners. These principles guide the specific legislative proposals:

1. It is desirable for children to grow up enjoying a normal family life in a permanent home to which they believe they will always belong. This offers the best opportunity for them to develop and thrive.

2. It is generally desirable for the child to remain with or be returned to the natural parent, on the assumption that the child's need for normal family life will usually be best met in the natural home, and that parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered. The State's first obligation is to help the family, with services to prevent its break-up or to reunite it if the child has already left home; and the parent has an obligation to act as such and, failing that, to cooperate with the efforts of the State exercised through social agencies to help him or her to do so.

3. When it is clear that the natural parent cannot provide this home, then a permanent alternative home should be sought for

the child.

4. The court process terminating rights must be as expeditious as possible consistent with safeguarding everyone's rights.

5. The decisions must be made on an assessment of the child's best interests, and on this criterion alone consistent with Due Process of Law and other constitutional concepts. However, this criterion can only be used effectively and with justice if certain conditions are met:

(1) That the expectations and requirements of the law are clear in advance to all concerned: the parent in placing a child in care; the agency, in working with the family or in deciding whether to seek court termination; the court in its ruling. The grounds for termination, while leaving adequate margin for judicial discretion, must be clearly defined, and

(2) That agencies working with families (and also Courts that must decide the fate of children and the rights and obligations of adults) have adequate resources to meet their obligations. This factor, though outside the purview of law, was stressed as often as statutory changes throughout the course of this Project.

The Commission's recommendations, evolving from this Project, for statutory changes have been incorporated into draft legislation (in "omnibus" bill form). A copy of the proposed legislation is included in this Report as Appendix I.

B. A Single Termination Statute; Retention of Separate Grounds for Termination

One of the major objectives of the Commission in its statutory recommendations is to simplify the law where possible and to eliminate confusion between the different grounds for termination of parental rights. As previously indicated, there are presently two major provisions for proceedings to terminate parental rights prior to an adoption proceeding - one contained in Section 384 of the Social Services Law and the other in Part 1 of Article 6 of the Family Court Act. This bifurcation creates minor research problems for participants in termination proceedings and contributes to extant confusion over the meaning of the statutes. However, more fundamentally, such bifurcation operationally reflects the absence of clear legal responsibility delegated to a single public agency to supervise and regulate the practices of social service agencies in terminating parental rights. This absence of clear supervisory responsibility in a single State agency arises in some degree out of the perception on the part of the State social services officials that they do not have primary regulatory power over the casework aspects of permanent neglect which is provided for and defined in the Family Court Act.These factors have led to disparity and often unsound, standards and practices in this area. Thus, the Commission as its first major statutory recommendation has proposed the creation of one section of the Social Services Law providing for a single proceeding for termination of parental rights (with various grounds, procedures and criteria) as will be discussed in greater detail below, and consequently a clear delegation of supervisory authority to the State Department of Social Services which is responsible for the promulgation of regulations implementing the provisions of that Law. Section 384 of the Social Services law has been retained solely as it relates to voluntary termination of parental rights (surrender instruments), and the permanent neglect provisions of the Family Court Act have been retained only insofar as they provide procedural requirements applicable only to that termination ground and for various other cross-referenced purposes. The new, substantive termination statute is contained in the proposed Section 384-b to be added to the Social Services Law.

1. Statement of Legislative Findings

The proposed new Section 384-b begins with a statement of legislative findings and intent. The inclusion of such a statement was suggested by the Citizens' Committee for Children of New York, Inc. to serve the following purposes: to provide clear evidence to the Courts of the Legislature's awareness of the need for procedures to free children for adoption to facilitate their becoming members of a permanent family; to clarify that the purpose of such proceedings is not to punish parents for past acts or omissions but to implement the child's need for a loving, nurturing family relationship; and finally to clarify that the Legislature has declared its paramount concern to be the best interests of children, the protection of which may require a dissolution of the parent-child relationship within constitutional limits. Accordingly, the Commission recommends the Statement as a means of attaining clarification of legislative intent and an understanding of the fundamental principles espoused therein.

The Commission's recommendation should not be construed as conferring any right upon a child, either explicitly or implicitly, to be legally freed or promptly placed for adoption (cf. Child v. Beame, decided February 20, 1976 (USDC, SDNY).

2. Retention of Separate Grounds for Termination

A major focus of this study was on the substantive differences between abandonment and permanent neglect: their definitions; to what extent and under what circumstances they are used as grounds for terminating parental rights; the desirability of retaining these two, distinct standards (in addition to other grounds for termination discussed, below).

The Project's Statistical Study found that counties varied greatly in the proportion of termination cases brought upon grounds of abandonment and permanent neglect. In three counties, abandonment was not used as a ground at all, while in New York City, it accounted for over 70 percent of the court termination cases initiated in 1973. This variability is too great to be explained by differences among the parents and children across the State.

Considerable confusion and disagreement were expressed about the provisions of the law, their intent, and about abandonment and permanent neglect as grounds for termination. Consequently, the Commission found that these standards are interpreted very differently from county to county, and (according to agency staff and attorneys) from one judge to another.

When asked about the need for separate standards, the judges, agencies and their attorneys were almost unanimous in recommending the retention of both abandonment and permanent neglect. The prevailing view is that these standards should be revised to clarify that they refer to different types of parental "failure", and, therefore, provide different periods of time in which to determine whether parental responsibilities are met. As expressed by one judge, "Permanent neglect requires a less extreme test; it is a less drastic standard." Time limits of six months (abandonment) and one year (permanent neglect) are widely seen as appropriate.

Therefore, the Commission has recommended that separate standards or grounds be retained - within the framework of a unified termination statute. Clarification of the distinctions between the grounds, being clearly necessary, (see text under "Abandonment", below, for a discussion of confusion extant regarding the separate grounds) has been accomplished in the consolidated statute, differences (substantive and procedural) being specifically highlighted.

C. Permanent Neglect

1. Diligent Effort Requirement

As previously noted, one element, required of the petitioning agency seeking to terminate parental rights on the ground of permanent neglect, is proof that it has made "diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the moral and temporal welfare of the child."

The prevailing view among judges and agencies is that the diligent effort requirement should be maintained. In explaining why, Shad Polier, Esq. (who drafted the permanent neglect statute) calls attention to his article,"Amendments to New York's Adoption Laws,"Child Welfare, July, 1959: "This requirement expresses a societal judgment that the community is not justified in terminating parental rights in the absence of 'abandonment' unless the community has, through the social agency, sought to reweld the parent-child relationship." Mr. Polier has also stated his belief to Project staff that the agencies' "diligent efforts" are indispensable as safeguards against arbitrary action by the State in terminating parental rights. Stating that "the parent has a constitutional right to intensive assistance that will enable him to care for his child", Mr. Polier urges that "agencies be given enough funds to carry out their mandate. Society must be willing to pay for what it wants."

It is the view of a small minority that this requirement should be eliminated because it is a stumbling block to freeing the child, thereby penalizing him. This minority viewpoint maintains that the diligent effort requirement focuses on what the agency has done rather than on the child's needs.

However, there are differences in resources available to agencies to help the parent; furthermore the agencies and judges differ on the meaning of the diligent effort requirement. Some reduce the concept of efforts to mean visits. Others believe they must include services to remedy whatever problems the parent has.

This Project found that Family Court judges across the State charge agencies with failing to exercise diligent efforts to strengthen the parent-child relationship. Some agencies, moreover, concede that they cannot fulfill their mandate. A minority of judges even argue that the parent is so dependent on agency willingness to provide such vital needs as money, housing and transportation, that the parent cannot effectively plan for the child because the agency has terminated its diligent efforts and the parent's visitation rights. In effect, some agencies, it is contended, will not fulfill their mandate.

The Commission, as reflected in its proposed new termination statute (Social Services Law, Section 384-b), recommends retention of the diligent effort requirement reflecting a sound societal value in addition to considerations of fundamental equity, if not constitutional rights, that the State should exercise reasonable efforts to restore familial relationships before seeking to terminate them. However, the Commission recommends that, in addition to the existing exception which waives the diligent effort requirement (i.e., where such efforts would be detrimental to the child's interests), there be an additional exception where the parent has failed for a period of six months to keep the agency apprised of his or her location. This exception to the diligent effort requirement is intended to relieve the agency of any affirmative obligation to make a "diligent search" in order to locate missing parents, but if the agency otherwise knows (without a "diligent search") the parent's location, the exception is not intended to apply. (See Page 105 below for the Commission's administrative recommendations on this subject.)

2. Failure to Maintain Contact or to Plan

The permanent neglect definition (Family Court Act, Section 611) requires proof that the "parent or custodian has failed for a period of more than one year...substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so." Those interviewed usually raised certain issues common to both the requirements of parental contact with and planning for the child. The majority believe that the terms are vague and need clearer definition in the statute. A minority, however, took the view that further definition would be a step in the wrong direction - that it would complicate the judge's task and impede the sound exercise of his discretion. Some in this group would eliminate the two requirements and substitute therefor a more general criterion such as "the inability of the parent to care properly for the child in the foreseeable future."

The planning requirement was viewed by many of those interviewed as an allusion to the most significant barometer of parental capacity. They declare that parents are unable to think realistically about the future, and that their plans are wistful fantasies. It is widely proposed that the statute should define "plan", for example, as "realistic, feasible, viable." The emphasis should be on "affirmative action that will result in the return home of the child." The plan should deal with basic needs. Some interviewees, who believe that the plan should include specific goals and a timetable, favor a form of contract between parent and agency, committing both to these goals. A parent's refusal to make use of counseling, medical or other services made available to him should be considered a failure to plan, they say.

The Commission agrees that the present statutory phrases "contact" and "plan" are vague and have created conflicting judicial and agency interpretations. Accordingly, it recommends that the following criteria and definition be included in the proposed new Section 384-b: (1) "A visit or communication by a parent with the child which is not of such character as to reasonably demonstrate affectionate and concerned parenthood shall be deemed an insubstantial contact". (This criterion acquires relevance in the context of the provision of law retained in the proposed statute that "evidence of insubstantial or infrequent contacts by a parent with his or her child shall not, of itself, be sufficient to preclude a determination that such child is a permanently neglected child." This provision was added to the permanent neglect law, by Chapter 704 of the Laws of 1975, in response to the decision of the New York Court of Appeals in Matter of Susan W. v. Talbot G., 34 N.Y. 2d 76.)

(2) "'To plan for the future of the child' shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent."

3. The Two-Stage Proceeding - Fact Finding and Dispositional Hearings

As previously noted, permanent neglect proceedings involve two separate hearings - a fact finding hearing (F.C.A., Section 622) in which the Family Court determines whether the allegations of the petition are supported by a fair preponderance of the evidence, followed by a dispositional hearing (F.C.A., Section 623), in which the Court determines whether the child's interests require that parental custody be terminated permanently and, if so, what order of disposition should be made.

During the course of this Project a few judges and many agency personnel recommended that the dispositional hearing be eliminated on the belief that upon a finding of permanent neglect, termination of parental rights should ensue automatically and immediately and that delay pending completion of the dispositional hearing merely serves to impede permanency for the child. However, the majority of Family Court judges preferred that the dispositional hearing be retained, indicating that during the hiatus between the two hearings, parental attitudes and behavior may change - often as a result of the impact or shock of the fact-finding hearing itself.

One intermediate or compromise position was proposed, which recommended the establishment of a presumption that, upon an adjudication of permanent neglect at the fact-finding hearing, it is in the child's best interests for parental custody to be terminated, unless clear and convincing proof is presented at the dispositional hearing that another disposition would be in the child's best interests.

The Commission agrees with the generally held viewpoint of the Family Court Judges that the dispositional hearing should be retained - particularly as it provides an appropriate forum for the consideration of alternative dispositions after the fact-finding hearing. The Commission agrees that it is not necessarily in the child's best interests in all cases to terminate parental rights after an adjudication of permanent neglect - particularly because circumstances and the nature of the parent-child relationship may have changed substantially following the one year period during which the child was technically a permanently neglected child. Accordingly, the Commission's proposed, revised permanent neglect statute retains the Family Court Act concept of the two-stage proceeding.

However, the Commission recommends two related statutory changes. First, it suggests that "Evidence of parental contact or of failure to maintain contact with a child subsequent to the date of the filing of a petition...shall be inadmissible in the fact-finding hearing" but that "Such evidence may be admitted in the dispositional hearing but shall not, of itself, be sufficient as a matter of law to preclude or require an order committing the guardianship and custody of the child." (The phrase "committing the guardianship and custody" has been substituted, in the proposed legislation, for the existing phrase "permanent termination of custody" so that termination of parental rights will be expressed in a unified, conformed way in all termination proceedings.) This recommendation will clarify the law so as to retain the fundamental difference between the purpose of the two hearings. It will also preclude situations (which have occurred in a few instances, as observed by the Project Staff) where a permanently neglecting parent has attempted to defeat the purpose of the proceeding through the insincere expression of parental interest upon receipt of service of process initiating the proceeding.

Conversely, it would impose an equal prohibition against an agency which might discourage or terminate parental visitation or other contact after the initiation of the proceeding and then seek to take advantage of the results of _its_ action by introducing evidence of the resulting lack of "contact" in the fact-finding hearing.

Secondly, the Commission recommends a statutory change permitting the Court, _upon consent of all parties_, to dispense with the dispositional hearing and make an order of disposition on the basis of evidence admitted at the fact-finding hearing. Thus, where a dispositional hearing is _truly_ unnecessary, grounds for avoiding it would be provided.

4. _Presumption of Permanent Neglect_

Some interviewees advocated, as a means of facilitating the freeing of a child for adoption in a permanent neglect proceeding, that a "presumption" (of permanent neglect) be codified in such situations as where there have been extensive, repeated placements of a child by his parent or where the child had remained in foster care for a specified lengthy period of time (which varied among the proponents of this approach from as little as two years to as high as five years). The effect of creating such a rebuttable presumption would be to shift the burden of proof (or at least of coming forward with evidence) to the parent.

The suggestion of the creation of a presumption evoked strong sentiments by those on both sides of the issue. Proponents of presumption stressed the harm done to the child when he remained for years in foster care. Family Court Judge Robert Wagner of Monroe County advocated that, if the parent does not take the child home within approximately two years, and does not show that he or she can care for the child, a hearing should be held and, on the basis of a rebuttable presumption, the child should be freed.

The most vehement opposition to creation of a presumption came on constitutional grounds. As stated by one attorney,"Presumption is 'class legislation'; it is unconstitutional, as it violates due process and equal protection under the law." Another objection is that presumption is unfair to the parent, particularly if the agency has failed to carry out its obligations to reestablish the relationship. It is also held to be unfair to the parents who are unsophisticated and would not understand a "rebuttable presumption" and might be deprived of their children because they would not come forward to deny the presumption.

The Commission recommends that a presumption of permanent neglect not be established. It would certainly be constitutionally suspect - a grave danger at a time when the Federal Courts have manifested willingness to strike down termination statutes on constitutional grounds (see, for example, Alsager v. District Court of Polk County, Iowa, U.S. District Court for Southern Iowa, December 19, 1975). The Commission also notes that legislative proposals to establish presumptions of permanent neglect (or of a prima facie case of permanent neglect) on the basis of time in foster care have failed to pass the State Legislature in recent years.

D. Abandonment

1. Parental Intent - Subjectivity

As noted above, in a line of cases beginning in 1924 with Judge Cardozo's decision in Matter of Bistany, the Courts have read into the "abandonment law" a subjective element of proof of parental intent to forego forever their parental rights and responsibilities. Both the wisdom and validity of this judicial interpretation were questioned by many persons, including judges, interviewed during the course of this Project. To be sure, not all judges have adhered vigorously to this line of case law. For example, Surrogate Midonick, in Matter of Vanessa F., 76 Misc. 2d 617 (Surrogate's Court, New York County) held that "abandonment is not defined in terms of intention but rather in terms of conduct, such as failure to visit a child for more than six months...without good reason...The infant's moral and temporal welfare has little, if any, relation to the parent's intent, merely to the tragedy of being without a parent..."

The Commission agrees that parental intent is a relevant consideration in the determination of abandonment, but believes that manifestations of parental intent through acts or conduct is a more appropriate and objective criterion which should guide the Court. Accordingly, it recommends in the proposed new statute (see proposed Social Services Law, Section 384-b, subdivision 5, paragraph (b)) a requirement that parental intent be manifested by certain specific conduct. It also clearly provides that "The intent of the parent, whether expressed or otherwise, unsupported by the foregoing parental acts [visitation and communication] manifesting such intent shall not preclude a determination that such parent has abandoned his or her child."

2. Distinguishing Between Abandonment and Permanent Neglect

The only statutory definition of abandonment now exists in Social Services Law, Section 371, subdivision 2, set forth earlier in this Report. Judicial decisions, it appears, vary in their adherence to this definition (with or without the addition of judicially promulgated "amendments"). One result of this inconsistency, deriving in part from the inadequacy of the statutory definition, is that some judges in cases where abandonment is at issue have additionally required of the petitioner evidence which should be relevant only to permanent neglect proceedings. The most blatant example of this confusion between abandonment and permanent neglect is the requirement of evidence that the petitioning agency has exercised diligent efforts to encourage and strengthen the parental relationship. Although neither the abandonment definition nor the statutory basis for terminating parental rights on the ground of abandonment (Social Services Law, Section 384.6; Domestic Relation Law, Section 111) include a "diligent effort" requirement, judges, nevertheless, have applied the requirement in abandonment cases. (See, for example, Matter of Anonymous, 48 A.D. 2d 696 (2nd Department) and Matter of Vanessa F., above.)

A few agencies agree that "diligent effort" should be required in abandonment proceedings as a matter of "sound casework practice", but the majority are opposed to exercising such efforts because the parent cannot be physically located. Some judges oppose the requirement, stating that its use is an example of the accretion of case law conflicting with the intent of statute.

The Commission believes it is of great importance to clarify the distinction between abandonment and permanent neglect. Therefore, believing the "diligent effort" requirement to be sound only within the context of permanent neglect and not applicable in the usual context of abandonment where the agency is proceeding against an absent parent (particularly as the Commission proposes to redefine abandonment, below), the Commission recommends specific language in its proposed Social Services Law, Section 384-b, providing that the determination as to whether a parent has abandoned his or her child shall be made without regard to efforts, if any, by an authorized agency to encourage the parent to visit and communicate with the child or agency.

Furthermore, if not foremost, in the belief that confusion between grounds for termination can best be minimized, if not totally eliminated, by clear definitions of the various grounds, the Commission recommends the following new definition of "abandonment" for inclusion in the proposed Social Services Law, Section 384-b, subdivision 5: "A child is 'abandoned' by his parent if such parent, while the child is in the care of an authorized agency, evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so. In the absence of evidence to the contrary, such ability to visit and communicate shall be presumed." The proposed subdivision also includes a provision which would require that "Payment by a parent toward the support of the child shall be deemed a communication by such parent with the child or agency".

At a glance, it might appear that the proposed Section 384-b definition and standards relating to abandonment require only minimal actions by a parent - that such definition and standards require no substance of contact between parent and child - that they invoke no qualitative evaluation of the parent-child relationship. This is true, and it has been intentionally done for the following reasons:

(1) The distinction between abandonment and permanent neglect would be finally and clearly delineated. Abandonment by the common meaning of the term itself implies that the child involved is a waif or has been deserted, and any broadening of this concept would only serve to mislead, confuse, and continue the plethora of problems arising from the blurring of distinctions between abandonment and permanent neglect as legal grounds for termination of parental rights.

(2) Where the demanding abandonment provisions of Section 384-b cannot be met, the petitioner (agency or foster parent), has an alternative - permanent neglect - a ground which has been carefully redrawn so that it will appropriately serve as a basis for termination of parental rights in all cases where the parent of a child in the care of an agency has failed to meet a fair, qualitative test of society's reasonable expectations of a parent.

(3) Termination proceedings on abandonment grounds may, under the proposed statute, be brought either in Family Court or in Surrogate's Court. To limit jurisdiction to the Family Court would overburden a Court already plagued with congestion and delay. Furthermore, the abandonment ground as proposed would permit Surrogate's Court to appropriately determine clearer, non-qualitative issues within the scope of its unique capababilities, staff and fiscal resources.

In essence the Commission's proposed definition of agency abandonment, by lessening the controlling effect of parental testimony of subjective intent under prevailing case law, thereby focuses on the parent's actions relating to the child. The clarity and objectivity of this new definition will enable agency attorneys to better evaluate whether a given child's situation will satisfy these statutory criteria. To the extent that this is so, attorneys and agencies will be less hesitant in bringing appropriate cases to court.

The Commission also recommends retention of the existing distinction between permanent neglect and abandonment relating to the time period which must have elapsed while the child was in care: in the case of abandonment, the period of six months immediately prior to the initiation of the proceeding, and in the case of permanent neglect, a period of more than one year following the date the child came into the care of the agency. The Commission observes that the distinction makes even more sense in the light of the difference between the grounds, particularly as abandonment would be defined under the proposed legislation.

E. Mental Illness or Mental Retardation of Parent

As noted above, parental mental illness is a relatively new ground for the termination of parental rights, having been added to Section 384 of the Social Services Law by Chapter 513 of the Laws of 1973. Mental Retardation of a parent is an even newer ground which was enacted in 1975 by Chapter 706. Therefore, there has been little experience with the mental illness ground and none reported to the Project staff regarding mental retardation. Two of the county departments included in the Project have not, as yet, made use of the mental illness ground for terminating parental rights, and a number of judges, attorneys and agency staff have raised questions both about its constitutionality and some of its requirements.

Some Family Court judges held the view that "there are serious constitutional problems in taking children away from parents because of physical or mental illness," and that "there is danger of terminating rights because of disapproval of a life style." Judges and attorneys express concern about the vagueness of the criterion that returning the child to the custody of the parent would endanger his well-being. Some attorneys believe that the language of the statute is "unconstitutionally vague" and therefore will not be upheld on appeal. They point out, moreover, that, as a result of strides in the treatment of mental illness, psychiatrists are reluctant to predict capacity of a mentally ill parent to provide appropriate care for the child in the foreseeable future.

As of this writing, the mental illness ground for termination has in fact been tested on the Appellate Court level in New York and successfully overcame a constitutional attack on the basis of the "Equal Protection" clause of the 14th Amendment. In Matter of Berman (on behalf of Becky A.H. anonymous ,49 A.D. 2d 327 (Second Department, November 10, 1975),Associate Justice J. Irwin Shapiro stated:

> "The governmental objective sought to be achieved by subdivision 7 is the promotion of the welfare of children and the conservation of State funds, as is evidenced by the statement of the Legislature's purpose in adding that subdivision to the law. The omission of the Legislature to make provision for the adoption of destitute or dependent children of physically ill parents, while making such provision for children of mentally ill parents, does not invalidate the statute under the equal protection clause..."

It should also be noted that an Oregon statute providing for termination of parental rights on grounds of mental illness has successfully withstood a constitutional attack before that State's Supreme Court (a petition for certiorari has been filed in the United States Supreme Court (Wade v. State of Oregon, Docket No. 74-6666).

Project staff discovered that agency workers were under the misapprehension that the New York statute applied only to the parent who had been hospitalized at the time of the proceedings, or immediately prior to their initiation. Some recognized difficulties in obtaining testimony when parents are in mental institutions out of the State or when the parent refuses to submit to a psychiatric examination.

Other informants welcomed the statute, because it makes it possible to free the child in certain unfortunate circumstances. They point out that this is, in effect, a "no-fault" statute that does not blame anyone for not being able to care for the child.

Even those who recognize the value of this statute, however, believe that judges must become more knowledgeable about psychiatric evidence and that psychiatrists must be more skilled in presenting evidence than has been demonstrated.

One other significant problem has been raised regarding termination of parental rights upon grounds of mental illness or retardation. The question was raised as to whether a parent could defeat the proceeding by reason of her being unavailable for professional examination or by refusing to be examined. As a solution to this problem the Commission has recommended, in its proposed legislation, the following provision:

> "If the parent refuses to submit to such court-ordered examination, or renders himself unavailable therefor, whether before or after the initiation of a proceeding under this section, by departing from the state or by concealing himself therein, the appointed physician, psychologist, psychiatrist, upon the basis of other available information, including, but not limited to, agency, hospital or clinic records, may testify without an examination of such parent, provided that such other information affords a reasonable basis for his opinion."

It should be noted that appropriate existing provisions of the Civil Practice Law and Rules provide procedures for the taking of testimony outside the State, which would apply in situations where the parent was outside the State at a known address and was available for examination there.

The Commission also recommends that the definitions of "mental illness" and "mental retardation" be conformed in their references to the danger of returning the child to the custody of the parent. Thus, the same phrase, "the child would be in danger of becoming a neglected child as defined in the Family Court Act," would be utilized in both definitions.

F. Severe or Repeated Child Abuse as a Ground for Termination

Severe or repeated child abuse is not presently a ground for permanent termination of parental rights. Section 111 of the Domestic Relations Law states that the consent of a parent may be dispensed with if he has been "judicially deprived of the custody of the child on account of cruelty or neglect." Aside from the fact that this provision is unclear in that the phrase "cruelty or neglect" is vague and undefined and does not relate to the definitions of abused or neglected child contained in the Family Court Act (Section 1012) or Social Services Law (Section 371), and may, therefore, be constitutionally defective, the significant fact remains that the provision remains somewhat of an anachronism in the law and no recent instances of its use could be ascertained by the Project staff.

The problem of abused children was of major concern to those interviewed, and a majority of judges and caseworkers stated their belief that severe abuse should be grounds for termination of parental rights; a minority are opposed. Most respondents to Project staff questions make it clear that isolated or single instances of abuse should not be grounds, and that, in any event, termination should not be automatic upon adjudication for child abuse. Several agencies propose that the second adjudication of abuse might be added as a ground for termination of rights.

Dr. Vincent J. Fontana of the New York Foundling Hospital, a nationally renowned expert on the subject of child abuse, has agreed that there may be circumstances of child abuse so severe as to warrant permanent termination of parental rights. However, he has appropriately observed that one of the guiding principles of Article 10 of the Family Court Act relating to child protection proceedings is the obligation and societal benefits of attempts to rehabilitate an abusive parent. He, therefore, suggested that any attempt to permanently terminate the rights of an abusing parent should occur only after rehabilitation has been attempted but has been unsuccessful. Some judges have also recognized the need to make rehabilitation efforts, but have observed that cases will arise where the child has been so damaged by parental abuse that the relationship with the parent is beyond repair.

The Commission has determined that where child abuse, repeated or so severe as to constitute nonrehabilitatable depravity on the part of the parent, occurs, it should provide the basis for permanent termination of parental rights. The present remedies available to the State are inadequate: an adjudicated abused child may be placed in foster care for a period not to exceed eighteen months which period may be extended for additional periods of one year each. Thus, the child remains in foster care limbo with no permanent family relationship or is returned to the abusive parent and subjected to the danger of repeated abuse, if not death.

Accordingly, the Commission's proposed legislation includes a new dispositional alternative for the Family Court authorizing it, upon adjudication of child abuse, to permanently terminate parental rights (i.e., commit the guardianship and custody of the child to an authorized agency). The proposed provision, to be added to Article 10 of the Family Court Act (child protective proceedings), provides as follows:

> "§1058. Commitment of guardianship and custody.
>
> For purposes of section one thousand fifty-two, the court may commit the guardianship and custody of the child to a duly authorized agency upon a finding, based on clear and convincing, competent material and relevant evidence introduced in the dispositional hearing, that the best interests of the child require that such action be taken, and that
>
> (a) the child or another child for whose care the respondent is or has been legally responsible has previously been found to be an abused child as a result of the respondent's acts; and that reasonable efforts to rehabilitate the respondent have been unsuccessful and are unlikely to be successful in the foreseeable future; or
>
> (b) the child has been found to be an abused child as a result of acts of the respondent evincing a depraved indifference to human life."

The Commission, mindful of fair notice and due process requirements, also recommends, concomitantly with the above proposed amendment, that an amendment be made to Section 1052 of the Family Court Act requiring the Court in entering an order of disposition to "advise the respondent that any subsequent adjudication of child abuse arising out of acts of the respondent may result in the commitment of the guardianship and custody of the child pursuant to section one thousand fifty-eight."

Finally, it should be noted that the Commission's proposed revisions to Section 111 of the Domestic Relations Law (see below) would render unnecessary the consent to adoption of a parent of a child whose guardianship had been committed to an agency pursuant to the above quoted addition to Article 10 of the Family Court Act.

G. Drug Addiction or Alcoholism

During the course of the Project various respondents recommended that, like parental mental illness or mental retardation, drug addiction or alcoholism of the parent should be added as grounds per se for termination of parental rights. However, the Commission has concluded that the nature of these afflictions, unlike mental illness or mental retardation, is such that medical and other professionals could not reasonably be expected to render a firm opinion as to whether such parents are likely to be rehabilitated or whether the child is likely to be endangered if returned from foster care to such parents.

However, the Commission believes that the problem of the addicted or alcoholic parent may be partially resolved within the framework of the permanent neglect law which presently requires parents to maintain contact with or plan for the future of the child, "although physically and financially able to do so" (emphasis added). The Commission recommends (in its proposed new termination statute) that with respect to this parental physical ability requirement, "A parent shall not be deemed unable to maintain contact with or plan for the future of the child by reason of such parent's use of drugs or alcohol, except while the parent is actually hospitalized or institutionalized therefor." Thus, drug addiction or alcoholism would not, of itself, constitute an excuse for parental failure to "maintain contact with or plan for the future of the child", but in recognition of the fact that the permanent neglect concept entails qualitative elements requiring contact and planning to be of substance, an exception is provided in circumstances where the parent is hospitalized or institutionalized for treatment of his problem. This exception not only recognizes the great difficulty, if not impossibility, of maintaining substantial contact or making substantive plans for a child while in an institution or hospital, but is also intended to encourage parents who are alcoholics or drug addicts to seek treatment without fear of losing their children as a consequence. It should be noted that similar provisions regarding alcoholics and drug addicts have not been added to the proposed provisions relating to abandonment in Section 384-b, because those provisions require only minimal, non-substantial contact which society appropriately may expect a parent to maintain, notwithstanding the above disabling conditions. For purposes of abandonment, the parent is presumed able to at least communicate with the child or agency, in the absence of evidence to the contrary.

The Commission has also recommended that in permanent neglect situations, "the time during which a parent is actually hospitalized [or] institutionalized...shall not interrupt, but shall not be part of, a period of failure to maintain contact with or plan for the future of the child". Under this provision, if, for example, an alcoholic parent failed for five months to maintain contact and then entered a hospital or other institution for treatment for a period of time, the time period would not be included in the computation of the requisite one year period for permanent neglect; however, upon discharge from the hospital, continued failure to maintain contact for seven more months, when added to the original five months failure to maintain contact, would be sufficient to meet the statutory requirement. In effect, the period of institutionalization merely "tolls" the running of the year period; it does not require a new one year period to begin.

H. Required Consents for Adoption; Domestic Relations Law, Section 111

Section 111 of the Domestic Relations Law is a pivotal statute in the concept of termination of parental rights. It is that section of law which permits children to be adopted without parental consent. Where parental custody has been terminated in a permanent neglect proceeding or the guardianship and custody of the child has been committed to an agency (presently pursuant to Section 384 of the Social Services Law, by way of a surrender instrument or through a judicial proceeding), it is only by virtue of Section 111 that the last element in attaining permanence for the child - his adoption - is attained.

Authorized agencies generally (and understandably) do not place children for adoption until one or more of the above-mentioned methods of terminating parental rights have been successfully effected. However, it must be remembered that agency placements are not the only type of adoption in this State; adoptions also result from the so-called independent or private placement, which do not involve authorized agencies, and which may not necessarily be supported by a prior termination of parental rights. In these situations where parental consent to adoption has not been previously obtained, the provision of Section 111, permitting adoption without parental consent under specified circumstances, are crucial.

With these factors in mind, the Project staff carefully reviewed the provisions of Section 111 - their usefulness, relevance and conformity with the previously noted statutory recommendations of the Commission.

The first major problem confronted was the approach to be taken in dealing with abandonment under Section 111 as a ground for the concept of dispensing with the consent of a parent. Most of the problems and proposed remedies discussed above in the section of this Report dealing with abandonment are equally applicable within the context of Section 111. However, there is one basic distinction in applying the concept of abandonment within the context of the two statutes which must be clearly understood. The Commission has recommended delineation between abandonment and permanent neglect as it affects termination proceedings initiated by authorized agencies under the suggested new Section 384-b, and the differences between the concepts, as defined in that recommendation, provide the agency with alternative approaches to termination. If the situation is "blatant", it may be brought as abandonment after six months with the aid of all the proposed new criteria, such as non-subjectivity, applicable to abandonment. If the situation involves some contact (visits, letters, etc.) but of an insubstantial nature, permanent neglect becomes the appropriate ground for proceeding after one year (and here, too, with the aid of new criteria and clarifying definitions).

However, the private adoption petitioner has no such choice and is not an appropriate initiator of a permanent neglect proceeding (aside from the very limited situation of foster parents authorized pursuant to Social Services Law, Section 392, or Family Court Act, Section 1055,to institute permanent neglect proceedings). Accordingly, the Commission's proposed concept of "abandonment" in Section 111 (which label, incidentally, is not utilized in Section 111 so as to avoid confusion) is broader than that proposed to be included in the new termination statute (Section 384-b) in that it retains the present language requiring, in effect, that parental visits and communications be of substance. The language included in the proposed amendments to Section 111 is basically that added by Chapter 704 of the Laws of 1975 in response to the Court of Appeals decision in Matter of Susan W. v. Talbot G., above, which incidentally, involved a private placement adoption. The proposed distinction between abandonment concepts also would appear to reflect the actual present practice in many courts, as ascertained during the course of this Project.

Another recommended distinction between the "abandonment" concept in the two statutes (Domestic Relations Law, §111 and Social Services Law, §384-b) relates to the effect of child support payments by a parent. Under the abandonment test of the proposed Social Services Law provision, any payment by a parent toward the support of the child is deemed a communication by the parent with the child or agency and, accordingly, would defeat an allegation of abandonment. However, under the proposed amendment to Section 111 of the Domestic Relations Law, which will almost always apply in private-placement adoption situations where no permanent neglect alternative is available, the parent must make child support payments to the extent of his financial ability to do so, before such action will be deemed a substantial communication with the child thereby defeating an attempt to dispense with the need for his consent to adoption. This distinction reinforces the primary difference between the two "abandonment" tests - the element of the quality of parental contact, which is present in the Domestic Relations Law provision but not in the Social Services law definition. It also serves to avoid discrimination against parents where dire poverty circumstances may prevent them from contributing at all to the child's support.

The second problem confronted in Section 111 involved deletions of anachronistic or antiquated provisions. Thus, the references to "persons adjudged to be habitual drunkards" and persons "judically deprived of the custody of the child on account of cruelty or neglect" (see discussion above of the new ground for termination based on severe or repeated child abuse) would be deleted, as recommended in the Commission's proposed legislation.

The third major change involves considerations of conformity and consistency, where appropriate, between Section 111 and the termination statutes. Thus, dispensing with parental consent on grounds of parental mental illness or retardation is cross-referenced for definitional, procedural and other purposes to the definitions, criteria and procedures provided in the termination statute. In addition Section 111 would be amended to utilize new phraseology contained in the termination statutes and to make other minor conforming changes.

Another issue posed in Section 111 involves the ground for dispensing with the need for adoption consent of a parent "who has been deprived of civil rights." (Chapter 246 of the Laws of 1975 amended the Section to require that such parent be afforded notice of the proposed adoption and an opportunity to be heard thereon.) Caseworkers report that among the parents who entrust their children to public care are a number who are imprisoned. A problem arises, they say, when one parent surrenders the child for adoption while the other is incarcerated.

The interviewees raised two issues regarding the imprisoned parent. First, should a parent deprived of civil rights automatically lose his parental rights? A few proposed that the answer take into account the parent's ability to rear the child, as measured by such considerations as the length of the prison sentence to be served.

In contrast, some judges take the view that imprisonment constitutes a "good reason" or a "physical inability" that excuses the parent from meeting the requirements of the abandonment and permanent neglect laws.

The second issue is procedural; is it practical, it is asked, for a parent who is in prison on a serious felony conviction to be present at a hearing at which his parental rights are at issue. Some judges stressed that no parent should be deprived of his child without a hearing. Others were concerned for the harm to the child if he could not be freed because a hearing could not be held.

No proposals to amend the law in regard to this issue commanded any widespread support, although there was considerable dissatisfaction expressed with the present provisions of the law. The Commission does not, at this point, believe it possesses sufficient information to afford it basis for any reasonable recommendation for change in the law (aside from a minor change clarifying that consent of a parent deprived of civil rights is required if the parent's civil rights have been restored.) It will, however, devote further study to the problem and make recommendations thereon when appropriate. (Reasons for affording the incarcerated parent a right to be heard are set forth in Matter of Anonymous, 79 Misc. 2d 280 (Surr. Ct. 1974)).

It should be noted, parenthetically, that with respect to permanent neglect, provision has been made in the proposed new termination statute (Social Services Law, Section 384-b) to deal with incarcerated parents, in a manner similar to drug addicts and alcoholics, concerning issues of ability to maintain contact with or plan for the future of the child and of time period computations (see pp. 42-44 above).

I. Adoptability of Child As Condition for Termination of Parental Rights

Project staff on a number of occasions ascertained that the "adoptability" of the child, in the judgment of some agencies and judges, was, in effect, a condition precedent to the freeing of a child for adoption - arising either in the decision of the agency in determining whether to initiate a proceeding to terminate parental rights, or in the determination of the Court as to whether to enter an order in a proceeding already brought. (The issue also arises within the context of the Section 392 foster care review proceeding as it relates to the agency's recommendations to the Court and the Court's ultimate decision as to whether it should order that a termination proceeding be initiated - Section III of Part Two, below.) It is to be noted that the child's chance of being placed in an adoptive home is not a statutory criterion and is not reflected in the rules of the State Board of Social Welfare or regulations of the Department of Social Services. Nevertheless, although the availability of adoptive parents is not required by statute or even recommended by State agency standards, some judges and agency staff feel strongly that freeing a child for adoption when the prospects of adoption are considered dubious would deprive the child of whatever family ties he may have. This appeared to be a minority viewpoint, however, and most judges and social workers believe with equal strength of conviction that the present unavailability of adoptive parents is an inappropriate reason for keeping a child in foster care. Those holding this viewpoint emphasize that an adoptive home can be found for almost any child, given sufficient agency commitment to that objective and the wherewithal to attain it.

The Commission has given careful consideration to this issue and has concluded that perceptions of the child's "adoptability" are inappropriate as a criterion for determining whether to initiate a proceeding to free a child for adoption and whether to grant the relief requested in petitions in such proceedings. The Commission believes that a determination that adoptive parents are not likely to be found is one which tends to become a self-fulfilling prophecy. It also notes the experience of such organizations as the Council of Adoptive Parents of Rochester, and the L.C.S. Spaulding for Children, which have experienced noteworthy success in placing "hard to place" children who had been deemed unadoptable by other agencies. In view of the foregoing, the Commission recommends that the use of this untenable criterion by a Court in a termination proceeding be specifically precluded and has included the following phrase in its proposed new termination statute:

> "In a proceeding instituted by an authorized agency pursuant to the provisions of this section, proof of the likelihood that the child will be placed for adoption shall not be required in determining whether the best interests of the child would be promoted by the commitment of the guardianship and custody of the child to an authorized agency."

J. Surrender Instrument

As previously noted in Section I of this Part, a parent may voluntarily relinquish his parental rights by executing, pursuant to Section 384 of the Social Services Law, a surrender instrument. The Commission has noted that the existing provisions of that Section provide for surrenders for purposes other than adoption. Particularly as a result of the enactment in 1975 of Section 384-a (Chapter 710) providing for instruments for the transfer of care and custody of children by a parent or guardian to an authorized agency for non-adoption purposes (i.e., "temporary" foster care), the use of the Section 384 surrender for any purpose other than adoption has become anomalous. Accordingly, the Commission has recommended statutory amendment to Section 384 to clarify that surrenders are solely designed for the voluntary termination of parental rights for adoption purposes. Conforming amendments are also recommended in other sections of law where necessary.

Additionally, the Commission has recommended that Section 384 be amended to clarify that a child under the age of eighteen years may be surrendered. This change would remove any confusion resulting from the definition of "child" ("under sixteen years of age") in Section 371 of the Social Services Law, and would provide uniformity as to the age of the child in all provisions relating to termination of parental rights - involuntarily by court order or voluntarily by surrender instrument.

K. Termination Proceedings - Procedural Provisions

1. General Procedures

One of the criticisms directed by attorneys at existing termination provisions, particularly those contained in Social Services Law, Section 384, highlight the absence of guidelines on the general procedures to be followed by attorneys for the parties and for the Court as well. Although the permanent neglect law does not typify this lack of information (the Family Court Act, generally containing procedural guidelines with additional detail provided in Article 6, Part 1), Section 384 is resoundingly silent in its absence of adequate procedural guidelines, and this would be reflected in procedural difficulties in both Surrogate's and Family Court depending upon the ground for the proceeding and, therefore, the court of jurisdiction.

To alleviate this problem, the Commission's proposed termination statute includes specific provisions on venue (the county in which the proceeding is to be brought), jurisdiction (the court which has authority to hear the proceeding), and also includes specific provisions on how the proceeding is to be originated (by petition), who is to receive notice of the proceeding, how service of process is to be effected, and, finally, what other procedural provisions of law are applicable, which is dependent upon the Court (Surrogate's or Family) which has exercised jurisdiction.

2. Evidence - Privileged Communications

The Commission has observed that in child protective proceedings under Article 10 of the Family Court Act, there is no privilege attaching to certain confidential communications (such as between spouses, social worker-client, physician-patient) as a ground for excluding evidence which would otherwise be admissible. The exclusion of the evidentiary privilege in those proceedings was added to the law because it was felt that, because the proceeding is designed to protect the best interests of children, it was important to enable the Court to obtain all relevant evidence bearing on the child's best interests.

The Commission believes this principle is equally applicable to other proceedings affecting children and, therefore, recommends in its proposed legislation the elimination of the confidential communication privilege in termination proceedings, foster care review proceeding and in custody proceedings both in Family Court and in Supreme Court.

3. Service of Process - Publication

Legal costs to agencies in initiating and pursuing proceedings to terminate parental rights are often exceedingly high. This has been identified as a significant barrier to the freeing of children for adoption to the extent that the expense of the proceedings may deter their initiation. One of the factors contributing to the expense of the proceedings is the high cost of substituted services of process by publication (in one or more newspapers).

The problem of publication involves more than the expense issue. Provision is made therefor in Section 617 of the Family Court Act which in turn cross-references the reader to section three hundred seven of the Surrogate's Court Procedure Act. The S.C.P.A. procedures at best are unclear, particularly as to the number of times publication must be made and the number of newspapers.

In Matter of Jasmine L., 375 N.Y.S. 2d 755 (Family Court, Bronx County, October 8, 1975), Judge Leon Deutsch remarked, "There is no particular magic in the number of newspapers used; nor in the number of times process is published...The party noticed is as unlikely to see notice in one newspaper as in two; and equally as unlikely to see the notice whether published once or more than once."

The Commission agrees with Judge Deutsch. Insofar as publication, as a legal fiction, provides, in effect, only constructive notice - and undue expense to the agencies and constitutes to some extent a barrier to freeing children for adoption, the Commission, therefore, recommends in its proposed legislation that notice, in termination proceedings, by publication requirements be clarified and conformed in the applicable procedural sections of law, and be limited to a requirement of publication once in one newspaper. Although much could be said here on the subject of which newspaper might be more apt to provide actual notice to a party, the Commission deems this to be an issue of significance beyond the scope of this Project and would suggest that the issue is one more appropriately for the consideration of the Office of Court Administration.

L. Periodic Family Court Review

The Project staff found that a number of judges (particularly, but not only, in New York City) complained about the heavy burden of foster care review cases. The Commission found considerable justification in these complaints and is recommending an amendment that should result in a reduced caseload related to foster care review. The Commission recommends in its proposed legislation that children who have already been freed for adoption be removed from the purview of the foster care review (Social Services Law, Section 392). The Commission is cognizant of the enactment of Chapter 702 of the Laws of 1975 establishing a new and strengthened Statewide Adoption Service in the Department of Social Services, and believes that appropriate implementation of that law would provide a more effective means than Family Court foster care review for obtaining adoptive homes for children who are free for adoption. Additionally, this recommendation would substantially reduce the Courts' (and the agencies') foster care review caseload thereby enabling them to concentrate their limited resources on children who might be returned to their families or freed for adoption.

A second recommendation on the topic of foster care review relates to the present absence of any standard to guide the Family Court judge in determining whether to enter an order directing that a proceeding be initiated to free the child for adoption. Many Family Court judges in New York City include, as a matter of practice, in orders to institute a proceeding to free the child, the phrase "if legal grounds exist." The Commission recommends that Section 392 be amended to provide an appropriate criterion for the Court. The standard suggested in the proposed legislation (for when the Court should order the initiation of a proceeding to free the child) is "if the Court finds reasonable cause to believe that grounds therefor exist."

Another complaint of the attorneys is that the statutory provision giving the agency 30 days to comply with the Court order to initiate a termination proceeding (after which time a foster parent may be authorized to do so) is often insufficient time for the adequate preparation of the case. They also indicated that circumstances sometimes arise after the Court order which render inappropriate the institution of the proceeding at all. The Commission, accordingly, recommends that the 30 day period be extended to 90 days and that provision be added to permit the agency, for good cause shown, to obtain a modification or extension of the order to institute the proceeding to free the child (which is preferable to the present deplorable situation which sometime occurs, whereby the Court order is ignored when compliance is found to be impossible or detrimental to the child). Because of this liberalized time period, Courts should be less hesitant to impose currently authorized sanctions upon non-complying agencies.

A final, clarifying change to meet difficulties raised by interviewees, is recommended to provide that the maximum 24-month period, in which a second or subsequent foster care review must be heard, shall run from the time of the "entry of the last previous order of disposition." This provision will eliminate unnecessary hearings following closely after the completion of a prior 392 review. Furthermore, the Office of Court Administration has informed Project Staff that an order continuing foster care, but requiring a subsequent progress report, constitutes a final "order of disposition"; addition of this law, therefore, will not confuse the dates by which subsequent 392 review proceedings must be commenced.

M. Miscellaneous Issues

1. Counsel for Adults in Surrogate's Court

Chapter 682 of the Laws of 1975 amended the Family Court Act, County Law and Judiciary Law, to provide the right to counsel for adults in Family Court proceedings, including the right of indigent adults to have counsel assigned. Inexplicably, the statute failed to recognize that in proceedings such as adoption proceedings and some proceedings for termination of parental rights, the Surrogate's Court had concurrent jurisdiction, and did not extend the right to counsel to such proceedings in that Court. As a conforming, if not constitutionally required change, the Commission's proposed legislation recommends necessary conforming amendments to include the Surrogate's Court.

2. Custody Proceedings; Best Interests Criterion; No Presumption

The Law presently provides that in certain proceedings involving custody of a child (Social Services Law, §383.5, Domestic Relations Law, §115-b.3(d) (2), and Family Court Act, §631(c)) the order of disposition must be made solely on the basis of the best interests of the child, and that there shall be no presumption that such interests will be promoted by any particular disposition. Believing this concept to be sound and widely accepted, the Commission recommends its extension to other sections relating to matters involving child custody be they in Family Court or Supreme Court. (See proposed new Family Court Act, Section 655 and CPLR, Section 7013.)

3. Putative Fathers

In the light of the U.S. Supreme Court decision in Stanley v. Illinois, 905 U.S. 645, and, more recently the New York Court of Appeals decision in Orsini v. Blasi, 36 N.Y. 2d 568, appeal dismissed by U.S. Supreme "for want of a substantial federal question", 96 S. Ct. 765 (1976), questions have been raised as to the rights of the fathers of children born out of wedlock. These questions have created substantial delays in initiating proceedings to free children for adoption in that issues are raised on such matters as the right to notice, to be heard, to participate as a party, and the obligation of agencies to make diligent searches for putative fathers whose rights, constitutional or otherwise, may be in jeopardy. The nebulous state of the law and the resulting confusion on the part of agencies, attorneys and judges, have made the study of this problem a matter of priority for the Commission. The Commission has received a grant from the Edna McConnell Clark Foundation for various studies including the issue of the rights of putative fathers. It is the intention of the Commission to complete this study shortly and to submit its statutory recommendations to the Legislature during the 1976 session.

4. Temporary Transfers of the Care and Custody of Children

Section 384-a of the Social Services Law was added by Chapter 710 of the Laws of 1975 to provide for an instrument, distinct from surrender instruments, for the temporary transfer by a parent or guardian of the care and custody of a child to an authorized agency. During the course of this Project, two distinct problems with this section were ascertained, and the Commission proposes appropriate statutory amendments to resolve those problems.

First, it has been observed that it is not unusual for a parent to leave a locality after entrusting the care of a child to a relative, neighbor or other person who becomes unable or unwilling to continue to care for the child. If the parent is unavailable at the time the relative, neighbor, or other person can or will no longer care for the child, no provision exists for the execution of the transfer instrument by the person entrusted with the child's care. The Commission's proposed legislation would authorize such person to transfer care of the child to an agency (without dilution of the rights of the parent to seek return of the child thereafter as already provided by law).

Secondly, it has been noted that the ten days accorded an agency to initiate a termination proceeding, custody proceeding or a child protective proceeding, enabling it to obtain a Court order authorizing it to retain custody of the child, notwithstanding a parent's demand for the child's return, is inadequate. Equally important, serious questions exist as to whether a child protective proceeding may even be initiated while the child is in the care of an agency.

The Commission's proposed legislation would authorize the agency to retain care and custody of a child if a termination,custody or child protective proceeding is pending; it would also clarify the right of the agency to institute a child protective proceeding, while the child is in its care, if the return of the child to the care and custody of his parent or other person legally responsible for his care would place him in imminent danger of becoming an abused or neglected child.

5. Other Conforming Amendments

(a) Age of Child - Termination Proceedings

Attorneys interviewed by Project staff have pointed out that there appears to be no clear rationale for the statutory differences for the maximum age for a child as this relates to the different grounds for termination of parental rights. For example, under the Family Court Act, a "permanently neglected child" is one under 18 years of age. However, under Section 384 of the Social Services Law (by virtue of the applicable definition of "child" in Section 371,the relevant age is "under 16 years of age." The Commission agrees there is no reasonable basis for this distinction and, accordingly, recommends in its proposed termination statute, a uniform definition of "child" - "a person under the age of 18 years."

(b) "Best Interests" Criterion

In recent years most substantive amendments to the child welfare laws have utilized the criterion of the "best interests of the child" as opposed to the more archaic phrase, "moral and temporal interests." The Commission's legislation would effect conformity by changing the latter phrase to the former in various sections of law.

N. Concluding Statement

The foregoing discussion summarizes the problems and issues which the Commission has addressed and, it believes, remedied in its proposed legislation. It is to be expected in any legislation of such breadth and magnitude and affecting so many persons and organizations with disparate viewpoints and interests that no one group will approve all the proposed changes; conversely, it is hoped, no one group will oppose all the proposed changes. However one may view separate portions of the legislation, the fact remains that it represents, probably for the first time, a comprehensive, unified approach to a complex, highly specialized field and its inherent and systemic problems. In the final analysis the Commission hopes that all will approach the legislation in the spirit, and with the objective that it has borne in mind at all times: the betterment of our one unity of interest and our identical constituency - the Children of the State.

PART TWO

THE COURTS

I. INTRODUCTION

As outlined earlier in this Report, the Family Court's involvement in child welfare matters has both changed and expanded markedly in recent years as a result of new roles (see Social Services Law, Section 392) and new grounds for termination of parental rights.* The new roles and added responsibilities have greatly increased the volume of cases that are brought before the Family Court in every county. In New York City, for example, there were 8,249 foster care review hearings in 1973. Court hearings have also become more protracted as a consequence of various protections now afforded parties before the Family Court, such as the right to counsel which may now result in the participation of up to five attorneys -- for the child, the parent, the foster parent, the New York City voluntary agency, as well as for the New York City Department of Social Services, Division of Special Services for Children (S.S.C.). Much time is spent in the assignment of lawyers to parent and child, and in the adjustment of attorneys' schedules (which occasions adjournment delays).

The greater volume of cases brought, and the extension of protections such as right to counsel are cited by judges and by attorneys of voluntary agencies as major reasons for the long delays that often occur before the Court makes a decision whether to free a child for adoption. This study found that 148 (14%) of the 1,019 Court termination proceedings begun in 1973 in the agencies surveyed had not been disposed of by May 1, 1975. Similar delays take place in reaching judicial decisions as to whether a child is neglected or abused, and in New York City both the voluntary agencies and Special Services for Children have experienced neglect and abuse cases pending up to two and a half years before final adjudication. These delays are not only harmful to the welfare of the child but also impede the agencies' ability to effectively plan for the child, as for example, in finding an adoptive home for him.

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*Additional judicial responsibilities were added in 1973 with a new Section 358-a of the Social Services Law, which provides for judicial approval of instruments placing certain children in foster care.

Agency staff are concerned about the expanding role of the Court in child welfare. In part, they are disturbed about the amount of time that must be spent in court, away from clients. A concern of greater magnitude, however, is a deeply perceived difficulty in the ability of the agency to deal effectively with the Court in an atmosphere of mutual respect. (This point is discussed in greater detail below, see, pp. 76-77.

Judges also express concern about their new roles, increasing caseloads, and their lack of sufficient information and resources for making decisions upon sound basis.

In essence, there are problems in the courts perceived by the various participants in the judicial process - jurisdiction, administration, attitudes, roles and relationships - and it is the nature of these problems and possible solutions which this section of the Report shall encompass.

II. JURISDICTION OVER PROCEEDINGS TO TERMINATE PARENTAL RIGHTS

The Surrogate's Court has jurisdiction concurrent with that of the Family Court over proceedings to terminate parental rights on the ground of abandonment and over adoption proceedings; unlike the Family Court, however, it does not possess jurisdiction over proceedings for terminating parental rights on grounds of permanent neglect or the mental illness or retardation of the parent. Particularly in the light of concern with Family Court congestion and delay, this Project addressed the following two issues: to what relative extent Surrogate's Court and Family Court are utilized where concurrent jurisdiction now exists, and whether it would be desirable to change the present jurisdictional boundaries.

Information was sought from agencies on their relative use of Surrogate's and Family Courts for purposes of adoption proceedings. Seven public agencies and over 30 New York City voluntary agencies were asked to report the number of adoption proceedings brought before each Court in the twelve months prior to May 1975. Of the 524 proceedings reported by the public agencies, 64% were before the Family Court and 36% before the Surrogate's Court. There were, however, differences between counties: the four upstate counties and Westchester each used the Family Court much more frequently, and the Surrogate's Court accounted for only 27% of the proceedings in the aggregate; in New York City and Suffolk the preference was reversed, with 58% of the proceedings in the Surrogate's Court and 42% in Family Court.

Twenty-one voluntary agencies in New York City provided data on this question. Overall, 66% of these agencies' 714 cases were brought in the Surrogate's Court, 34% in Family Court. In fact, twelve of these agencies -- a majority -- used the Family Court predominantly or exclusively, but nearly all of these agencies dealt with very few cases; while the four largest agencies in this respect (accounting for 60% of all these voluntary agency adoption proceedings) used the Surrogate's Court for an overwhelming 90% of their cases. Generally, the agencies using the Surrogate's Court had more adoption proceedings overall than agencies using the Family Court.

In summary, outside New York City, counties except Suffolk were using the Family Court more; in New York City, the Surrogate's Court was preferred both by New York City S.S.C. and by the voluntary agencies with large caseloads.

As indicated above, the Commission has considered possible changes in jurisdiction involving Surrogate's Court. Particularly, it has conjectured that the Surrogate's jurisdiction might be expanded to include proceedings to terminate parental rights on grounds of permanent neglect and mental illness or retardation (in addition to their existing jurisdiction over abandonment proceedings). The predominant reason for considering the question of such jurisdictional expansion was the perceived need to relieve the Family Court of part of its great caseload burden. Agency attorneys in New York City were in the forefront in pressing this recommendation (and, as just noted, they were indeed using the Surrogate's Court more in adoption proceedings where concurrent jurisdiction exists). Opinions were elicited on this issue from Surrogates, Family Court judges, and staff of the Office of Court Administration.

Thirty-five Surrogates from counties throughout the State were asked to respond to this issue. Replies were received from 27 of them: four withheld their opinion; 21 opposed expanding jurisdiction to include permanent neglect proceedings. Of the 21 opposing this jurisdictional expansion, 17 opposed any expansion, while four approved extending Surrogates' jurisdiction over proceedings to terminate parental rights on grounds of mental illness or mental retardation.

However, two Surrogates were in favor of expanded jurisdiction to include permanent neglect, one making it conditional on the availability of additional facilities, services and personnel.

The Surrogates who opposed additional jurisdiction most frequently cited the following three reasons:

-- they lack the staff;

-- they lack the resources and necessary investigative services;

-- the Family Court is better equipped to cope with the complex problems that often arise in such family-oriented proceedings.

Other reasons given for opposing expansion were that: permanent neglect bears no relation to any other matter before the Surrogates; the Family Court works more closely with departments of social services and has more information on the cases; there is no provision in Surrogate's Court for the appointment of counsel for the indigent, competent adult; expansion of concurrent jurisdiction would encourage "forum shopping"; expanded jurisdiction could result in duplication of services, or would substitute one court for the other with no benefit to either.

The four Surrogates who supported expanded jurisdiction for termination based on mental illness or retardation, said such expansion would be consistent with the Surrogates' function because it relates to matters of guardianship which are presently within the Court's jurisdiction.

Family Court judges, in the course of interviews, strongly opposed expansion of jurisdiction for the Surrogates, and some judges questioned the concurrent jurisdiction that presently exists.

Family Court judges in New York City generally believe that, ideally, all termination proceedings should be in Family Court, but faced with the reality of limited staff and inadequate physical facilities, they concede that, realistically, some termination proceedings must continue to be dealt with by both courts. They support the need to provide the Family Court with the facilities and staff it needs to meet its growing responsibilities.

Finally, staff of the Office of Court Administration (OCA) recommend that the jurisdiction of the Surrogates should not be expanded, and cite as their reasons the Surrogates' lack of resources and expertise in areas in which expansion of jurisdiction has been suggested, and current fiscal problems that would prevent the implementation of any such expansion. Moreover, if resources were available, say O.C.A. staff, they would better be utilized in improving the functioning of the Family Court so it can more effectively meet its appropriately recognized responsibilities.

The Commission's Recommendation

The Commission concurs with the views of O.C.A. staff and the great majority of Surrogates and Family Court judges that the jurisdiction of the Surrogate's Court should not be expanded to include proceedings to terminate parental rights on the grounds of permanent neglect or parental mental illness or mental retardation.*

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*As this Report was in final stages of preparation, the Commission received a communication from S. Samuel DiFalco, Administrative Judge, Surrogate's Court of the County of New York, expressing the formal position of the Executive Committee of the Surrogates' Court Association , opposing extensions of Surrogates' jurisdiction. A copy of that correspondence is included as Appendix V.

III. FOSTER CARE REVIEW

As described earlier in this Report, Social Services Law, Section 392,"Pisani review" has given the Family Court responsibility for monitoring the agencies' stewardship over children in foster care. In a study entitled "Children in Foster Care: The Impact of Review by the Family Court" conducted for the Temporary State Commission on Child Welfare under this Project, Dr. Trudy Bradley Festinger of the New York University School of Social Work has analyzed the operation and consequences of the Court review for a group of New York City children placed in foster care beginning in 1970. This Study (which is presented in Appendix III of this Report) is a follow-up to an earlier study published in 1974 by Dr. Festinger, entitled "The New York Court Review of Children in Foster Care".* Dr. Festinger's second study reaffirms the utility of the Family Court review in securing permanent homes for children in foster care, either through discharge to their families or through adoption. In her study Dr. Festinger also presents a number of recommendations: for improving agency compliance with Family Court orders in Section 392 proceedings; for increased emphasis on efforts to terminate parental rights and to secure adoption placements particularly for children entering foster care when they are no longer infants; and for the need to provide services to families of children in foster care. Other findings relate to lack of judicial continuity and to non-uniformity in the use of agency attorneys in 392 hearings.

It should be noted that Dr. Festinger's study demonstrates that Family Court judges in 392 proceedings have relied heavily on agency recommendations, and this finding has been confirmed by the Commission in this Project.* It is interesting to note that this finding is in direct contradiction to the perceptions of many social services personnel, who have indicated to the Commission their concern that judicial personnel minimize or ignore the agency's reports and recommendations.

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*Supported by grants from the Field Foundation and Kenworthy-Swift Foundation.

The Commission's Project has focused most specifically on the major difficulties encountered in the implementation of the foster care review procedure. Much rhetoric was confronted which ignored one crucial fact: agency staff on all levels admit that most agencies, prior to the enactment of 392 review, had failed to take the steps necessary to move children out of care, and that outside pressure was necessary. While highly critical of the amount of time "wasted" in filling out forms for the courts or waiting for court appearances, caseworkers state that foster care review helped all responsible parties - caseworker, parent and foster parent - to focus on the child's need for permanency.

A statement by Carol Parry, Assistant Commissioner for New York City Special Services for Children, prepared for Project staff on foster care review typifies the point of view of many agency administrators:

> "The greatest advantage of 24 month foster care review is that it mandates the examination of plans for a child in foster care at some point in time. Otherwise, there is sometimes a tendency to let day to day emergencies take precedence over the formulation and carrying out of a long term plan. In addition, parents very often put off making the decision to bring their child(ren) home or to make other permanent plans for them. Foster parents often put off the decision to adopt/not to adopt."

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*See Tables 16 and 17 in Appendix II

Agency administrators also cite as the disadvantages of foster care review the view that Family Court judges sometimes cannot make sound evaluations of long term plans in foster care, and support the possibility of some requirement that judges be offered specialized social work training or that there should be provision for the appointment of social work consultants to Family Court judges. They also voice the need to reduce caseloads because caseworkers now spend vastly greater amounts of time in court and in preparing material for submission to court. When this is coupled with increased reporting required by various levels of government,they see the time available for actual service to the clients as greatly reduced.

Some agency administrators, however, have a more fundamental disagreement with judicial foster care review. Although critical of the review's perceived diversion of social services personnel from their primary task of serving clients, the administrators are most concerned about the Family Court's "incursion" into an agency's responsibilities. If the Court is allowed to make casework decisions, they point out, the Court is, in effect, "taking over the agency". These administrators suggest that an independent board of specialists in the child welfare field or another non-judicial administrative mechanism be responsible for the administration of foster care review.

In response to some of the criticism of agency administrators, Hyman Frankel, General Counsel for New York Human Resources Administration, wrote to Project staff that the agency view, critical of judicial capacity to evaluate long term foster care plans and which proposes professional social worker assistance,

> "...misses the point that the Legislature enacted the law as a monitor. It was precisely because the Legislature found inadequacy in the administrative machinery that the Judiciary was involved with its precise and exacting standards...The Legislature, however, has decided that foster care review should be a judicial function in order to expedite the process of moving children out of foster care (with its negative social and fiscal factors)...Once the court is involved, jurisprudential principles of strict adherence to due process, rules of evidence, and substantive provisions of law follow. These principles will continue to plague the social worker, so long as his or her social work judgment must be fit into the requirements of substantive law.
>
> "Caseworkers simply must understand that this is going to require court appearance. It _is_ an imposition on their time; it does become exacerbated because of crowded courts and calendar but it is unavoidable. Attempts to reduce the calendaring and scheduling problems in the Family Court are a partial solution."

A majority of Family Court judges across the State believe the Court should review the status of children in public care but differ in their use of the review and in their assessment of the review's strengths and shortcomings.

Family Court judges in Monroe County refer to foster care review as "probably the most important statute that exists for children." They are concerned about the need for the presentation of evidence independent of that presented by the agency and recommend that the appointment of a law guardian for the child be mandated as a means to fill this need. Stating that there must be a system for monitoring the agency's compliance with the Court's orders, they also recommend that a method be found to monitor compliance* as well as to document the results of foster care across the state. (Monroe's use of a "tickler" system to schedule follow-up reports on court orders to institute proceedings to free children for adoption appears to be successful. Monroe County is the only public agency in this study which provides for regular follow-ups of court orders and which has demonstrated 100% compliance with Court orders in this category.)

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*See Dr. Festinger's Study in Appendix III for comments on this point.

Onondaga County judges state that lack of evidence independent of the agency's report gives them little choice but to approve the agency's recommendations. (As Table 16 and 17 in Appendix II show,Onondaga County recommended and the court ordered "continue foster care" in 95% of the cases, and "discharge home" for the other 5%.) They believe that special staff should be assigned to the Court to gather independent evidence.

Judges in Westchester County also view foster care review as "one of the best laws for children in care" and believe it gives them an opportunity to return children to their families. When questioned about the high number of Court orders to continue foster care (90% in 1973), the judges responded that they had no choice because most parents were not ready to take their children home although they wished to do so, and the judges believe that they should only order proceedings to free the child for adoption if the child has a good chance of being placed in an adoptive home (i.e., the child is "adoptable". See Part I above, on Statutory Issues for a full discussion of this problem).

Judges in Suffolk County also use the criterion of the child's "adoptability" in ordering proceedings to free. If the child is over ten years of age they ask the Department for its assessment of the child's chances for adoption; if the child is over ten years old and handicapped, the Department almost invariably recommends "foster care continued" and the Court approves this recommendation. The judges tend to go along with the Department's recommendations "out of inertia and because of the reluctance to sever the mother from the child" if she demonstrates any interest at all. "We would push the Department harder to free children if we didn't have such a backlog of cases...These cases are long and involved and frankly, I don't have the judge power," the Administrative Judge of Suffolk County Family Court explains. (Tables 16 and 17 in Appendix II illustrate that in 1973 only in Suffolk County did the judges order proceedings to free less frequently than the agency made this recommendation.)

The Erie County Family Court Judges also use the criterion of the child's "adoptability" in ordering proceedings to free. Although "foster care continued" was ordered almost half (49%) of the time in 1973 (see Table 17 in Appendix II) they believe, nevertheless, that the review is beneficial as it permits them to order the agency to work intensively with natural parents so that the child may eventually be returned home. Except for an order to continue foster care (when not combined with a further order), the Court orders the Department to submit a report on progress in carrying out judicial orders by a specific date.

Project personnel studied a random sample of 79 cases that were reviewed in Erie County in 1973 (actual data were not supplied by the public agency) and found that the agency reported back whenever required by the court to do so. The Department complied with only 40% (4 cases) of the court's orders to "institute proceedings to free." The Department submitted reports on the remaining six children which led the judge to change the order to "continue foster care." Of the 79 cases studied, 28 children were already free for adoption at the time of the review. In only ten of these 28 cases did the Court order "place for adoption", whereas in 18 cases, the agency recommended and the Court ordered "continue foster care." Of these ten only five children had been placed for adoption by May 1975 and the records of the remaining children stated that long-term foster care was the plan for them.

Table 20 in Appendix II demonstrates that many social services agencies throughout New York State are building up a backlog of children who are free but are not being placed for adoption.

New York City Family Court judges expressed various frustrations and problems in implementing the foster care review statute. A primary problem related to the ability of the Court to independently review agency action and recommendations.[8] Without their own qualified staff to evaluate and supplement agency findings, the judges argue that they find themselves in the situation of almost being compelled to endorse agency recommendations without variation in form or direction.

Additionally, many New York City Family Court judges criticize the failure of the law to specify a clear obligation on the part of the agency to carry out the Court's order and a reasonable and effective sanction for failure to do so. (However, it is noteworthy that compliance by New York City's Special Services For Children and by the voluntary agencies is relatively high - 93% and 77%, respectively, on 392 orders to institute termination proceedings, (as indicated by Table 19 in Appendix II).

The Commission's Recommendations

The following are in addition to the Commission's recommendations for statutory changes relating to foster care review, set forth in Part One of this Report.

1. The State Department of Social Services (in consultation with O.C.A. and with the Family Court Advisory and Rules Committee) should design a Standard Investigation Form for use by all agencies in providing information at foster care review hearings. The Form should include, at the very least, information on parents' visits with the child; parents' visits and other communication with caseworkers; agency efforts to encourage the parent to retake custody of the child; information on foster parents and their interest, if any, in adoption. This will be of immense assistance to Family Court judges who must review many disparate documents in advance of the review hearing, and may not only shorten the hearing time but also eliminate some unnecessary hearings. It will also help the Courts to maximize their limited resources.

2. Family Court judges must be more diligent in complying with Chapter 342 of the Laws of 1975 which requires that:

> "An order of disposition entered pursuant to this subdivision shall include the court's findings supporting its determination that such order is in accordance with the best interest of the child. If the court promulgates separate findings of fact or conclusions of law, or an opinion in lieu thereof, the order of disposition may incorporate such findings and conclusions, or opinions, by reference."

Judges who spell out their findings as well as their reasons for orders will expedite appellate review and help their colleagues in subsequent reviews.

3. The Office of Court Administration should discuss with the State Department of Social Services the best methods for monitoring Court orders as, for example, the provision of monthly data on all Court orders by O.C.A. so that the State Department of Social Services can monitor agency compliance. Dr. Trudy Bradley Festinger, in her study for the Commission, has made recommendations for improved Court monitoring. The Commission urges consideration be given to them (See Appendix III).

4. Judges should greatly restrict the practice of prolonging foster care review on a particular child by issuing a series of orders and by requesting a series of follow-up reports. This practice consumes time of the Court, of the attorneys and of caseworkers, with little observed benefit to the child. It is recommended that judges order only those reports necessary for the production of information upon which an appropriate order of disposition will be made.

IV. THE JUDGE AND THE SOCIAL WORKER

Judges and social workers often have critical perceptions of each other. Many of the judges who were interviewed consider the social worker as lacking in skills to work with parents and as arbitrary or even punitive in terminating visitation. Social workers are equally critical of judges, whom they regard as biased towards the natural parent,* derogatory toward caseworkers in Court, and lacking in understanding about casework (as in regard to the child's need to adjust to a foster home, at which time a parent's visit could be upsetting) and in the need to avoid unnecessary disclosure of confidential information. Caseworkers in all the agencies relate that they have been abused and degraded by some judges in the presence of clients.

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*However, Tables 16 and 17 in Appendix II show that the Court orders discharge of the child to the parents in foster care reviews less frequently than recommended by agencies.

The foster care review appears to highlight the mutual mistrust of social workers and judges. It brings the social worker and the judge together to plan for the best interest of the child. Though they must work cooperatively in order to make appropriate decisions for children, there is little evidence of such cooperation prevailing in the courtroom.

The Commission's Recommendations

The Office of Court Administration and the State Department of Social Services should sponsor joint meetings of judges, attorneys, and agency staff to discuss substantive provisions of law, and legal interpretation,and to describe respective roles and responsibilities in order to develop greater interprofessional respect and cooperation.

V. LAW GUARDIAN FOR THE CHILD IN TERMINATION PROCEEDINGS AND IN FOSTER CARE REVIEWS

Pursuant to Section 249 of the Family Court Act, the appointment of a law guardian for the child is mandatory in proceedings under Article 7 of the Family Court Act (Persons-In-Need of Supervision, juvenile delinquency) and Article 10 of the Family Court Act (child protective), but the appointment of a law guardian is a matter within the Court's discretion in proceedings for termination of parental rights and in foster care review proceedings. The law guardian is defined as "an attorney admitted to the practice of law in the State of New York" (Family Court Act Section 242); his purpose is described as the protection of the interests of minors and assisting them to express their wishes in Court (Family Court Act, Section 241). The role of the law guardian is not specified further in statute.

There was a wide range of viewpoints among Family Court Judges interviewed on the need for, and effectiveness of, law guardians in foster care reviews and in termination proceedings. Monroe County Family Court judges, for example, unanimously recommend that they be mandated for every child in a termination proceeding and in foster care review, emphasizing that the law guardian, not the agency, is the child's spokesman. On the other hand, some Family Court Judges in Erie County describe the law guardians as an obstacle in termination proceedings, because they believe the guardian automatically opposes termination of parental rights, no matter how unfit the parent, unless an adoptive home is available.

While Onondaga Family Court judges believe that independent information should be available to the judge, they do not consider the law guardian capable of providing that information. Judges in Suffolk County differ among themselves on the usefulness of the law guardian and on the need for mandating one in the law. Those opposed to their use state that law guardians "are not attorneys of the highest competence..(and) take only an adversary role, if any role at all...The law guardian simply has no function, because everybody in the courtroom is concerned with the rights of the child and the judge must ultimately decide what are the child's best interests." Judges in Suffolk who favor the mandating of a law guardian for these proceedings specified that they approve "only if the statute stipulate(s) his/her responsibilities." New

York City Family Court judges describe varying experiences with the law guardians in termination cases and foster care reviews, but all agree that their usefulness depends upon individual competence.

Interviewed agency staff in most county departments of social services outside New York City generally do not believe that the law guardian is able or inclined to represent the best interest of the child. They say to support their contention, that some law guardians are biased towards the natural parent, and generally will not recommend the freeing of a child if there is no adoptive home available. Some caseworkers believe that law guardians are a hindrance because they see the child only briefly, if at all, and often fail to appear in court, causing adjournments. Many caseworkers in New York City S.S.C. and in the City's voluntary agencies believe that the law guardian's lack of knowledge of child development is a most serious shortcoming, or that being unskilled in interviewing the child, the law guardian is likely to upset him.

A contrasting view is presented in two higher court decisions. In the Court of Appeals case *In Re Ray A.M.* (37 NY 2d 619) Chief Judge Charles D. Breitel stated: "It is significant, too, that the Law Guardian for the child, a lawyer on the staff of the Legal Aid Society, has submitted a useful and thoughtful brief and argument... Since the child obviously cannot speak for herself, this highly competent neutral submission is reassuring..." In *In Re April T.*, 47 A.D. 2d 101, the Appellate Division, Fourth Department stated that, "Since a Court can act only on the basis of evidence established on the record, the single biggest determination of whether or not a child's interest will be protected is the availability of independent legal representation for the child by a person with the time and resources to investigate fully and present evidence in Court..."

Perhaps the most radical view on the role of the law guardian as an independent spokesman for the child and in compensating for the agency's perceived failure to act in such role is given by the New York City Legal Aid Society's Juvenile Rights Division. In a recent report, dated December 1975 entitled A Child's Right to Counsel in Proceedings Pursuant to Social Services Law Sections 358-a, 384, 384-a, 392 and Family Court Act, Article 6, the Legal Aid Society argues that failure to provide counsel for children who are removed from their homes or in termination cases is a "violation of the constitutional rights of children." Only the law guardian can represent the best interests of the child, according to the Report; the other attorneys argue from the viewpoint of their clients. Contending that "the court must preside as an arbiter - that it must not be an advocate," New York City's Legal Aid Society maintains that the Family Court judge cannot protect the child's interest in the absence of counsel.

In reviewing other recommendations made by Legal Aid as well as Family Court judges and agency staff who believe that the law guardian's role should be specified by statute, the following duties and responsibilities are noted:

- Advice to the Court on the child's feeling about his natural parents, his foster parents, and adoption, based on interviews with the child if (s)/he is old enough.
- Verification of the investigatory material that has been provided to the courts, based on reviews of agency records and interviews with caseworkers.

- Advice to the Court on the foster parent's interest in adopting the child,based on interviews with the foster parents.
- Subpoena and cross examination of witnesses.

The Commission's Recommendations

The Commission has already submitted legislation (Senate S.5251, A.8317 of 1975-76) to require that the Family Court appoint a law guardian to represent a child who is the subject of a foster care review proceeding, if independent legal representation is not available. The bill would also require that the law guardian or other counsel for the child be permitted to inspect agency records pertaining to the child. The Commission continues to urge enactment of this legislation. The Commission believes that further study of this issue is necessary before definitive further recommendations can be offered, particularly as it may relate to extending law guardian requirements to termination proceedings - an action which may have substantial fiscal effect in a period of fiscal austerity.

VI. SPECIAL PROBLEMS IN NEW YORK CITY'S FAMILY COURT

The relatively high volume of cases processed by New York City's Family Court creates certain unique problems. In addition, some of the administrative procedures of the Court and the practices of attorneys result in serious difficulties. The view of attorneys representing the agency, the parent or the child, and from staff of the Office of Court Administration were elicited on the major problems and suggested remedies.

A. Rotation of Judges

Family Court judges are rotated from Part to Part every

30 days and from borough to borough at varying time intervals. Agency attorneys and staff point out some of the consequences of this practice: for one, as many as four different judges may preside over the same foster care review of a child resulting in the need for the agency to submit numerous, duplicative follow-up reports on the child and on progress made. For another, each separate judge may hold hearings, make temporary orders or remands, and therefore, a final order of disposition is not expeditiously entered(in some cases final orders were not entered for as long as two and one half years, leaving the child's status unresolved). Thirdly, proceedings to terminate parental rights may result in mistrials in instances where the judge who first hears the case is transferred to another borough and cannot complete the case or retain it when he is moved to his new assignment.

Staff of the Office of Court Administration believe that there are many good reasons (as, for example, judicial vacancies) for retaining rotation. These reasons relate to substantive issues of deployment of judicial personnel and court space. O.C.A. and Judge Williams (New York City Family Court Administrative Judge) are studying the issue further and are considering increasing the period of time that the judge remains in the same Court part. An extension of the rotation period from the current 30 days to possibly six months is presently under consideration; this proposed change would preserve the benefits of rotation and eliminate some of its problems.

The Commission's Recommendation

A substantial increase in the period of time the judge remains at one assignment should materially reduce the delays in adjudicating cases caused by rotation. The Commission supports the changes which O.C.A. is considering.

B. Adjournments

Frequent case adjournments in New York City result in a large number of cases that are backlogged at any one time. Frequent causes of adjournment are: failure of the natural parent to appear in court; delay for appointment by the Court of an attorney for the parent or for the child when none has previously been appointed; failure of the attorney to appear in court; inadequate case preparation by attorneys, and exceptionally large judicial caseloads. A voluntary agency provided a log on adjournments in what it considered to be a typical termination of parental rights case:

May 1975: Attorney for mother appointed. Time in court: two hours.

June 1975: Mother, social worker and attorney for the agency are present in court at 9 a.m. as directed. Mother's attorney appears at 11:40 a.m. Judge postpones the hearing because 30 cases are scheduled to be heard. At 1 p.m. Judge states that the case would have been heard if mother's attorney had appeared on time. Law guardian is appointed for the child. Time in court: three and one-half hours.

July 1975: Mother and her attorney fail to appear in court. Time in court: one and three-quarter hours.

September 1975: New judge is presiding. Mother fails to appear in court. Hearing postponed until November 1975. Time in court: one hour.

As of September 1975 there were four hearings with eight and one-quarter hours time spent in court without one full hearing.

Staff of the Office of Court Administration believe that decisions to adjourn should not be left solely to the discretion of attorneys. The Standards and Goals promulgated by the Administrative Board of the Judicial Conference on July 3, 1975* attempt to eliminate the practice of adjournment by consent, by giving judges responsibility for adjournments and establishing a time period within which fact-finding hearings must be completed.

The Commission's Recommendations

The Commission finds the Standards and Goals to be a thoughtful response to the problem of excessive adjournments in Family Court and urges their conscientious implementation.

C. Discovery

A problem cited by attorneys representing the natural parent is the difficulty and ensuing delays that result from attempts by the attorneys to obtain agency records.

Despite the decision of the Appellate Division in Matter of Carla L. 45 A.D. 2d 375 (First Dept.) the New York City Department of Social Services and voluntary agencies have failed to adhere to the decision and Family Court judges, too, vary in their compliance. It is to be noted that such non-compliance directly contravenes express policy of the General Counsel of New York City Department of Social Services.

Under the procedures laid down by the Appellate Division, the legal representatives of parents and children must serve a notice to see the case record, and the agency must produce the record or ask the Court for an order of protection if there is a very strong reason why parts of the record should not be disclosed. Attorneys for parents and children state that frequently, when notice is served, agencies do not comply and the attorney has to make a motion for discovery (which, incidentally, Project staff have been informed cannot be made at times and only with great difficulty at other times - there appearing to be no uniform motion practice in the New York City Family Court), thus resulting in litigation and great delay. Attorneys particularly point to the New York City Department of Social Services as being most reluctant to part with case records. Even if the issue comes before the judge by a motion, attorneys contend that judges vary in their responses.

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*This document sets forth procedures for the timely disposition of matters before courts of both criminal and civil jurisdiction including the Family Court, and is intended to be implemented in steps between October 1, 1975 and January 1, 1979 under the supervision of the Courts' Administrative Judges.

In light of this problem, attorneys for the natural parents recommend that the record be filed in the Court for examination by all parties concerned, as is the practice in many other states.

The Commission's Recommendation

The Commission urges attorneys for agencies (both voluntary and public) to make fuller and freer disclosure of case records in the spirit of the Carla L. case. If attorneys cannot improve their practices voluntarily, the Commission will recommend an appropriate legislative remedy.

D. Scheduling of Termination Proceedings in the Long-Hearing Part

Attorneys for all parties requested that termination cases be scheduled in the Long-Hearing Part of the New York City Family Court. In a contested, complex termination case, many hours of testimony are required. The scheduling of such cases in the regular parts of the Court serves to keep the child as well as the parent in a state of anxiety for too long a time because of the lack of speedy resolution of the case in these parts, they believe.

Staff of O.C.A. have advised the Commission that the New York City Family Court does not have the necessary number of judges and other Court personnel to permit the assignment of all such termination cases to the Long-Term Parts. An experienced judge in the Intake Part assigns cases to various parts on the basis of the length of time estimated for the case and the resources available. Under present circumstances, O.C.A. staff believe that this is the most desirable system for the deployment of limited personnel and other Court resources.

The Commission's Recommendation

The Commission recommends **that** Long-Hearing Parts be used for termination cases to the extent that resources permit and can be made available.

General Recommendation

The Commission has found that Family Court judges are in some instances, inadequately informed, or not informed in a timely fashion of changes made by the Legislature with respect to statutes relating to foster care, adoption or termination of parental rights. The Commission is aware that O.C.A. recently has taken steps to convene judicial orientation meetings and urges that such meetings be continued and intensified; written materials should also be forwarded to judicial personnel as quickly after each year's thirty-day bill period as is practicable.

PART THREE

THE ROLE OF THE AGENCY

Introduction

The following section of this Report serves a dual purpose. Primarily, it conveys to the Department of Social Services the substance of information conveyed to Project staff on perceived problems encountered by Project participants in the administration of termination statutes and accompanying State Regulations. As noted below, the problems discussed are either (1) inherent to the casework process as this process relates to termination of parental rights; or (2) related to fundamental problems in the qualification, deployment and use of agency personnel.

Secondarily, based on these observations, the Commission makes recommendations to the State Department of Social Services for remedial action designed to improve State guidance and resultant agency performance. As such, the Commission's recommendations are not intended as embracing comprehensive analyses of and solutions to complex problems. They are intended rather as guides to assess and improve reported agency performance.

PART THREE

THE ROLE OF THE AGENCY

I. OVERVIEW: THE AGENCY'S MANDATE

State laws, Regulations of the State Department of Social Services, and Rules of the State Board of Social Welfare define the social service agency's role in freeing children for adoption. The agency's practices with regard to placement of children for adoption are considered in this study primarily as they affect the freeing of children for adoption and, to a limited degree, as such practices impact upon the placement of children in adoptive homes.

As a precondition for terminating parental rights, Part One of this study has noted that the permanent neglect statute requires the agency to make "diligent efforts to encourage and strengthen the parental relationship" and the agency must prove to the Court that it has done so. Otherwise the agency must prove that such efforts would be detrimental to the best interests of the child.

Section 392 of the Social Services Law (foster care review), in requiring the petitioning agency to state the disposition it seeks, assumes that the agency has made a permanent plan for each child; the freeing of the child for adoption is one of several options in its planning. The agency must comply if the judge orders it to institute proceedings to free the child for adoption at the foster care review.

State D.S.S. regulations establish fundamental requirements for the placement and supervision of children in foster care as well as conditions for initiating petitions to terminate parental rights.

State DSS Regulation 450.2 requires that during the foster care intake process, the agency must establish "a clearly defined plan of care and service to the child and his parents in cases for which the agency accepts ongoing responsibility." Furthermore, the agency plan must "state clearly the kind and degree of responsibility to be assumed by the parents and by the agency and by any other individuals or agencies that may be involved."

While the child is in foster care, DSS regulations require clear and recorded evidence of meaningful supervision through visitation of the child by the agency, visitation of the foster family homes and institutions as well as "planned and regular contact with parents where appropriate and possible for the purpose of helping them and the child to make the maximum use of placement, evaluating the continued need for foster care, and providing services designed to make possible the child's return to his own home or other permanent plan when necessary." As part of ongoing supervision, there must also be evidence of "an annual evaluation and plan in terms of case progress, including work with parents toward return of the child, or other permanent plan..."

With respect to the question of terminating parental rights, D.S.S. Regulation 450.9 requires the authorized agency to "identify at semi-annual intervals each child in foster care for whom permanent neglect court action is deemed essential to long-range planning in behalf of the child." The Regulation requires agencies to consider permanent neglect actions under enumerated circumstances such as: the parents failed to manifest interest, (e.g. visit or correspond with the child) did not keep appointments with the agency, failed to use services resources to solve problems which prompted placement of the child, or left the community without informing the agency of their new address.

This Regulation also requires that the agency, in reports dealing with parent-child relationships: indicate the parent's plan for the child, the agency plan and efforts to encourage and strengthen the parent-child relationship; or document the basis of agency decisions not to encourage and strengthen the parent-child relationship. The Regulation also sets forth necessary information and documentation to be provided in reports dealing with missing parents.

Further, Part 35 of the Rules of the Board of Social Welfare sets Standards of Practice for Agency Adoption Services. Section 35.1 (d) states: "Each child under care in need of adoption but not legally free for placement shall be identified as early as possible and the legal process to sever those parental or guardianship rights of custody and guardianship to the child impeding his or her speedy placement in an adoptive family shall be initiated."

New York State's policy, as defined by law and administrative rule, is to provide permanency for its children, preferably in their own homes and, only if this is impossible, through adoption. The laws, rules and regulations set the ground rules for termination of parental rights. However, in the all-important area of strengthening parental-child relationships, State policies give child care agencies great flexibility in administration and often, such policies are not effectively implemented. Indeed, failure of the agency to exercise diligent efforts in reuniting families can hinder the termination of parental rights on the grounds of permanent neglect and, in this sense, represents a barrier to the freeing of children for adoption.

A. The Judges' View

A majority of Family Court judges across the State believe that agencies do not make permanent plans for children in foster care, nor try sufficiently to reunite the parent and child. They cite: the failure of agencies to encourage and cooperate in parental visitation; agency failure to assist parents with their problems; the cultural and socio-economic differences between middle-class social workers and under-privileged parents; the bias of some workers against the parents; the conviction of some caseworkers that the interests of children are better served in foster care than in their parents' home. A few judges reason that the agencies have been given an overwhelming task and insufficient resources to deal with it.

Some judges allege that agencies deliberately or heedlessly subvert visitation and the restoration of the family. First, they believe some children are placed with foster parents of different values from, and often with antipathy to, those of the natural parents. Second, children are often placed in areas that are inaccessible to their natural parents. In the counties outside New York City, the parents are frequently dependent on the agency for transportation, which is irregularly provided.

A recent case before Family Court Judge Edith Miller*that combined a foster care review with a writ of habeas corpus brought by the mother epitomizes the difficulty. The two children of a Spanish-speaking mother from a poverty area were placed with foster parents who had no knowledge of Spanish and who lived in a small community, worlds apart from the mother's environment. In the six years that the mother was successfully coping with her own problems, the foster parents became attached to the children and wished to adopt them. The social worker had not encouraged visitation because of the language barrier between the mother and her children. Judge Miller wrote:

> "The Court finds that the placement of Lourdes and Jeanette in a solely English-speaking home when...the natural mother spoke only Spanish was the first step in unravelling the natural ties between the natural mother and her children...The girls have become so rooted in a small-town, thoroughly middle-class, protected environment that they experienced cultural shock on the few occasions that they were brought to the mother's home in a community with a myriad of social problems...The language problem made meaningful visitation impossible and it was inevitable that this barrier, combined with the failure to develop an orderly, realistic plan for the return of the children, has created the present impasse."

In concluding her opinion and decision to retain the children in foster care but to resume parental visitation, Judge Miller

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* In the Matter of Rene Del et.al., Family Court, New York County, September 17, 1975.

warned:

> "The Court at this time also cautions the (New York City) Special Services for Children not to heap undue criticism upon the agency...Until the (City) Commissioner sets forth clear-cut, written, specific guidelines in regard to foster care placement, problems will arise...Furthermore, the Court suggests that the Commissioner set up machinery within the Department to resolve problems of visitation and termination of placement..."

While not all problems of placement and visitation are so extreme, judges declare that few children see their parents as often as once a month. Infrequent visitation is attributed by the judges to such perceived agency attitudes and practices as: 1. more frequent visitation is administratively cumbersome; 2. The workers act as if the parent must "earn the right" to see the child by "shaping up" (taking steps prescribed by the worker); otherwise the parent is punished by not being allowed to see the child frequently; and 3. Some workers discourage visitation because it "upsets the child".

Infrequent visitation, for whatever reason, makes it virtually impossible for the parent to maintain a relationship with the child. Meanwhile, the child may develop strong ties to the foster parent that militate against ever sending him home. Further, in the view of judges, the agencies do not provide the services necessary to help the parents solve their problems.

B. The Agencies' View

All public department and voluntary child care agency administrators endorse the principles of permanent planning for the child and provision of services for parents. Such planning is, in the first place, sound casework practice. Both the Legislature and State

Department of Social Services err, however, in assuming that sound casework practice can be legislated without providing the necessary resources (fiscal and otherwise) for implementation, they argue vehemently.

Public agency administrators in the six county departments of social services outside New York City included in the Commission's Study concede that they cannot fulfill their mandate, blaming large caseloads, frequent turnover of staff, and the inability of the social work field to treat the severe problems of many of the parents, who may require psychiatric care. They believe that legislators refuse to acknowledge that while the provision of services can alleviate specific, severe problems of many parents, no service can eliminate their ambivalence towards their children in care: some parents can neither make a decision to accept nor to relinquish their children. In placing full responsibility for restoration of the parent-child relationship on the agency and none on the parents, the law is unrealistic and self-defeating, county attorneys and social workers contend.

Administrators of all departments, including New York City and its voluntary child care agencies, join in one complaint. They stress that as a result of recent child welfare legislation, caseworkers must spend so much time in court that they do not have sufficient time to provide needed casework service to their clients.

II. THE AGENCY'S DILIGENT EFFORTS

A. Visitation

1. Public Agencies

State policies detailed above emphasize that child care agencies must attempt to strengthen the parent-child relationship, so that children can be discharged from foster care. One crucial aspect of such relationship must involve actual parent-child contact through visitation. Because of the difficulties in specifying practices which often must be based on emotional factors and other intangibles, State laws, rules and regulations do not spell out how often foster children should visit with their natural parents. Further, there is no specific statewide policy to reimburse natural parents for transportation costs incurred in visiting their children in foster care.

Top administrators at public departments were unable to answer questions on frequency of visitation because "it varies from case to case." Discussions with supervisory and casework staff, however, reveal that there is a norm: in all public departments, the norm is usually monthly, initially at the agency office, later at the home of the foster parent; more frequent visitation subsequently takes place in the natural parent's home when plans are underway to return the child home. Supervised visits at the office generally occur when the children have been adjudicated neglected or abused or when the parents cannot or will not go to the home of the foster parent. Agency staff outside New York City admit, however, that because of new State mandates which increasingly impose on their time, providing for parental visitation "is far down on our list of priorities".

The top administrators were unable to quote local funds available for transportation. In New York City's S.S.C., funds have been available for transportation but parents are required to come to the office to get the funds, involving both additional fares and time away from their homes.

It was reported that visitation in counties outside New York City is seriously hampered by poor transportation, since most foster parents are located in outlying areas. As all public department offices are open only during standard working hours, working parents complain that they seldom see their children (at the agency office).

Among agencies surveyed, the most frequent practices in the public sector - visits at foster parents' homes - presented a number of problems: (1) public transportation is virtually non-existent in large areas of the State, making the parent totally dependent on the caseworker or other arrangements; (2) parents feel inferior to the foster parents who are caring for their children and are reluctant to visit them; and (3) many foster parents believe that visitation disrupts the children emotionally. These foster parents, not the caseworkers, through their attitudes and actions, in effect determine how often the natural parent can visit his own child.

Onondaga County varies from the norm in two ways: children visit regularly at their parents' homes and volunteers provide some transportation. When Chemung County started to make use of trained volunteers to bring together parents and children, visits were more successful. "The parents often feel that the caseworker sides with the foster parent," observed a supervisor. "But the volunteer is seen as a friend who is eager to help." While visitation practices differ among the undercare units in Westchester, case aides assist the caseworkers in providing transportation, and most units encourage the parents to take the children out of the agency office into the parks or on outings.

2. New York City Voluntary Agencies

New York City's voluntary sector varies from the norm in the public sector in several respects: in the first place,the majority of visits take place at the agency offices. Secondly, there is more variation on frequency of visits. Some twenty-five percent of the voluntary agencies have visits more frequent than monthly; they report a pattern of weekly or bi-monthly visitation. Some forty-two percent have less frequent visits; these agencies reported an ambiguous "as needed" pattern or did not respond to the question (suggesting minimal visitation). Thirty-three percent report the same frequency pattern as in the public agencies.

Further, one-third of the voluntary agencies reported annual funds made available for transportation ranging from $1,000 to over $5,000 (while others cited their inability to fund parental transportation costs). Also, agencies with institutions as well as foster homes reported recreation and other events for parents who visit their children. Campus-institutional visits appear to be regularly scheduled and the best planned to reinforce good parent-child relationships.

Many voluntary agencies express a growing sensitivity to the importance of visitation and admit that a greater flexibility is needed. Administrators at several agencies, for example, recognize that their basic policy of monthly visitation needs re-examination and revision. One agency, the Jewish Child Care Association, has devised an innovative five day foster care program where the child is in the foster home for five days and spends the weekends in the parent's home. Several agencies have an arrangement with the Long Island Railroad to make transportation accessible to the natural parents; one also has a worker who takes the child to the parent's home. Its policy on visitation is "as much as the family can take."

3. New York City Developments

New York City's Special Services for Children has a committee of prominent child care experts, attorneys and Family Court judges that discusses the implications of all child welfare laws for children, parents, foster parents and the agency. In 1975 the committee recommended, and S.S.C. implemented, a far-reaching program to protect parents' rights. A Parents' Rights Unit for parents of children in the care of public and voluntary agencies was established within the Department, and a Parents' Manual (in English and Spanish) was developed and given to parents at the time they place children in care.

On September 16, 1975 the Assistant Commissioner of

S.S.C. did promulgate a Policy Statement on Parental Visiting for New York City (its voluntary child care agencies and its own direct services). Emphasizing that "the more frequent the visitation, the more likely that the child will return home," the Assistant Commissioner's statement sets forth practical guidelines for voluntary agencies and S.S.C., including reimbursement for expenses for visits. The guidelines make clear that limitation or termination of visits must be approved by S.S.C., whereupon the parent is to be informed of the decision and of his right to appeal to S.S.C.'s Parent's Rights Unit or to the Court.

This Policy Statement is an important step in carrying out the charge to the New York City Commissioner to promulgate regulations on visitation stated by Judge Edith Miller in her Opinion on Lourdes and Jeanette (cited above, see p.91).

4. Agency Attitudes Toward Visitation

Staff at all levels interviewed throughout the State maintain that the parents who place their children in foster care today have greater emotional problems than the parents in the past. A significant number of these workers appear to have concluded that visits by disturbed parents can only harm children in foster care and therefore should not be encouraged. Some agencies - both public and voluntary - believe that they should not encourage visitation but wait for the parents to ask to see their children as a means for assessing the parents's interest. Often, parental visiting is viewed as an obstacle to initial adjustment of the child to the foster care situation.

It is apparent that although individual agencies are becoming aware of the importance of visitation, others are resistant because of either lack of staff or their concern about the parents' overwhelming problems. Visitation practices are generally tailored to the realities of the child's return. Visitation is encouraged primarily when the agency believes that return home is likely and it is often actively discouraged when legal action to terminate parental rights is contemplated.

The Commission's Recommendations

1. State D.S.S. should undertake a detailed statewide study of the pattern of visitation by natural parents of children in foster care to determine where and under what conditions visitation takes place, what transportation is provided, procedure reimbursement of parents for transportation costs, and related issues raised in this Report.

2. Upon completion of this study, the State Department of Social Services in consultation with appropriate public and voluntary child care agencies should promulgate regulations setting forth criteria and guidelines for visitation including: a minimum periodicity of visitation, how visitation may be encouraged, and the conditions under which visitation may be stopped. Such regulations should contain sufficient flexibility to be responsive to individual situations. Department regulations should also provide for the establishment of a uniform State policy on reimbursement for transportation costs, and for the inclusion in a child's case record of a record of the parent's visits to the child, with information on the child's reactions to recorded immediately after each visit.

3. The written agreement for placing a child in foster care should include specifics on periodicity of visitation as well as a statement on the agency's and parent's responsibility for visitation and the consequences to the parent for failure to fulfill his visitation responsibilities. This written agreement should be explained and put in the record at the Judicial Review "358-a" hearing.

B. Services for Parents

In order for child care agencies to follow State policies emphasizing efforts to strengthen parent-child relationships to enable the child to return to his family, or, on failure of such efforts to make another permanent plan for the child (i.e. adoption) these agencies must have the following capacities: clearly defined planning procedures; the capability to diagnose the problems of the parent and of the child; access to a host of concrete supportive and rehabilitative services; cooperation with community treatment programs (such as health, alcohol, and drug treatment); and a casework staff that can motivate the parents to avail themselves of services. Finally, the entire casework staff must recognize each child's right to a permanent home.

The Commission study asked each agency surveyed about its services to return the child to his home: its parental counselling activities and its ability to obtain and use necessary community social services.

1. Agencies' Ability to Provide Services

County Departments outside New York City report accessibility to vital concrete services, such as public assistance and housing. In New York City, by contrast, workers report horrendous difficulties in obtaining both public assistance and housing. It was unanimously urged by all New York City agency personnel, both public and private, that pressure be exerted by S.S.C. on public housing officials to establish a liaison with child caring agencies and, if possible, to give housing priority to parents with children in foster care, so that the family may be reunited.

There is a consensus among social services personnel that homemaker and day care services are critical to helping parents cope with their problems. Because such services are scarce, they are used primarily for preventing family breakups and are almost unavailable to parents whose children are already in foster care, according to public and private agency personnel.

Approximately one-half the caseworkers in the seven public departments surveyed believed themselves capable of counseling parents; the remainder considered themselves unequipped for counseling and would like intensive inservice training in diagnosing problems, counseling and child development. Many expressed the need for training in planning and in case management.

When problems are severe, caseworkers in both public and private agencies refer clients to community mental health, drug or alcohol treatment programs. While caseworkers in Westchester, Monroe, Onondaga and Chemung Counties are familiar with community resources, those in Erie County are unaware of any central listing of services. Suffolk caseworkers have access to a wide range of service sources in their district office and in the community (although recent decentralization of services delivery reportedly have created administrative problems). Workers in New York City's Special Services for Children state that they cannot keep up with changes in community resources.

The administrative staff of New York City's S.S.C. state that all the necessary services are given to the natural parents; caseworkers provide family counseling and visit parents as often as possible. They refer parents to community programs for most services, they say. However, caseworkers in the borough offices of S.S.C. complain of a number of obstacles: mental health services are crucial but difficult to obtain; cases received in one borough office come from throughout New York City so that caseworkers cannot easily maintain contact with the parents or be informed of all service sources; S.S.C. psychiatrists are available only to the children and foster parents, not to the natural parents. Caseworkers believe a cooperative relationship is needed between S.S.C. and community mental health clinics so that the parents will be accepted for treatment and the caseworkers kept informed of problems encountered.

Voluntary child care agencies differ widely in the range of services given to parents. Fourteen of the forty agencies report that caseworkers visit parents in their homes on a monthly or bi-monthly basis, provide counseling and give direct help in obtaining services from the community. Several agencies have group meetings for parents in the evening and on Saturday. Six of the agencies have specialized staff that include homemakers, child care specialists and employment counselors. Six agencies conduct day care programs both as a preventive service for children in their own homes as well as a service for children in care. A majority report that child care education is given. Many agencies refer parents to resources for mental health, employment counseling, homemakers and day care in the community(but acknowledge that parents often do not ultimately receive such services).

Voluntary agencies with offices in the parents' neighborhoods have special family workers who give assistance to the parents. Several others consider that their locations in nearby neighborhoods is an advantage in working with the natural parents. At least four voluntary child care agencies have special programs for unwed mothers. Living with their children in a foster home or a residential program, the young mothers are taught how to care for their children.

Agency Attitudes

Agencies in the public and voluntary sector believe that Family Court judges and the public fail to understand the enormity of their problems or appreciate the extent of their efforts. All agencies and a majority of child welfare attorneys urge policy makers to face realistically the fact that there is a limit to the efforts that agencies can make in motivating parents to use services and to accept responsibility for their children. Good casework practice dictates that parents be given responsibility for reconstituting the family, social workers declare.

Caseworkers in all seven public departments reiterate that their large caseloads prevent them from fulfilling the "diligent efforts" requirement of the permanent neglect statute. According to the caseworker, equally serious are the parents' ambivalence towards their children in care and the parental lack of motivation. A parent who really wants help can get it, they assert. To overcome the parents' resistance, individual caseworkers and members of supervisory staff in Onondaga County, New York City and Westchester County recommend a "contract" between the agency and the parent defining their responsibilities to work together for returning the child home. Some Family Court judges and child welfare attorneys endorse the idea of a contract. (New York City has revised its Authorization to Place Children in Care Form to state responsibilities of the parent and of the agency in providing necessary services and in working to plan for the future of the child.)

3. Public Funding Priorities

Agency administrators and caseworkers, judges, and attorneys interviewed all agree that funds for services to reunite families must be increased. Some individuals recommend a complete redistribution of funds now allocated to social service agencies. If public policy is in fact to retain the child at home, families on public assistance must receive sufficient amounts of cash assistance necessary to care for their children, they reason. Further, agencies must be reimbursed as much for reuniting families or keeping them intact as for keeping children in foster care. Current foster care reimbursement rates are viewed as contributing to maintaining children in foster care because they reimburse for per diem costs of child care (slots filled) and do not sufficiently encourage alternative services made to restore and reunite families.

The Commission's Recommendations

1. State D.S.S. should develop guidelines on casework and other services which should be provided to families of children in foster care, if only to satisfy the"diligent effort" requirements of the permanent neglect statute. Such guidelines should spell out circumstances when efforts to re-establish the parent-child relationship would be detrimental to the best interest of the child within the meaning of the permanent neglect statute.

2. Consonant with recommendations offered concerning matters of visitation (above), the role, rights and obligations of parents and agencies to work together to plan for the future of the child should be spelled out in the written agreement for placing a child in foster care, and read into the Court record at the "358-a" judicial hearing. This written agreement should also inform the parent of his or her obligation to keep the agency apprised of the parent's current address. Conversely, the agreement should also impose an obligation on the agency, when the parent visits or telephones the agency or one of its workers, to inquire as to the parent's current address.

3. State D.S.S. should take steps to assure that necessary up-to-date service information and referral resources are available to local agency personnel. In this context, the Commission is aware of, and supports State D.S.S. plans for the creation of a statewide index of services resources. Further, within available

funds, additional emphasis should be placed on the development (particularly under Title XX of the Federal Social Security Act) of additional training opportunities for social services personnel in the provision of casework services and in other needed skills.

4. State D.S.S. should review the basis for current foster care reimbursement rates in order to encourage agency services to reunite families. The Commission is cognizant of the utility of current State appropriations for preventive services but believes more fundamental restructuring of foster care rates is needed.

5. State D.S.S. should work with New York City S.S.C. to review reported difficulties in administration and coordination of S.S.C. services delivery in order to improve system effectiveness.

C. Permanent Planning for Children

On January 8, 1975, the State Department of Social Services distributed a Letter on Service Plans for Children in Foster Care. The Letter cites the "increasingly severe criticism" leveled against departments of social services for "the lack of adequate planning for children who are in foster care" and reminds local commissioners of their responsibilities outlined in Departmental regulations. Noting that "the provision of foster care, in itself, is not a goal," the Letter directs the agency "to establish a time frame during which every possible effort will be made to enable the child to be reunited with his family." Such efforts failing, the agency is directed to plan for the child's adoption, or as a last resort, for his long-term foster care.

Although the Department's directive is laudable, public and voluntary agencies have often failed in their planning for children in foster care because of a variety of complex factors. Specific difficulties often cited by agencies relate to shortage of competent staff as well as time consuming procedural requirements established by State regulations and statutes, which may take time away from case planning and case services.

A 1974 Report by Case Supervisors in Westchester County's Foster Care Division epitomizes this situation: "For children in foster care, permanent plans (return home or legal availability for adoption) were achieved for less than 8 percent of the caseload....Approximately only six percent of the 1974 undercare caseload were returned home; 1 1/4 percent were freed for adoption. Surely these are distressing statistics. But if our agency is to be goal oriented, with major emphasis on rehabilitating parents so that children can be returned home or freed for adoption, then priorities have to be established so that a more constructive, meaningful and purposeful professional task is set forth for our staff."

1. Problems in Planning: Criteria for Decision-Making

During this study, the Commission found that the administrative and supervisory staff of most public and many private agencies continue to plan by the traditional method of case-by-case analysis of problems at supervisory conferences. "Caseworkers are not attuned to making plans," one case supervisor in a public department states. "The plan may be in the mind of the worker but is never set down on paper." In all agencies interviewed, staff were asked their criteria for a decision to adopt a specific plan for the child. Most agencies were unable to clearly define their criteria. One agency's statement perhaps best illustrates this point: staff were able to define cases as falling into three groups - one group where the plan is clearly adoption (criteria would be parental alcoholism, addiction, mental illness); a second group where the plan is clearly return home (criteria would be where the natural parent is working actively with the agency to accomplish this objective). However, they report, most cases fall into a third group or "gray area" where there is no clear cut plan and no clear criteria on how to arrive at a decision for a plan.

2. Use of Specialized Staff

Examples of good case planning and the use of qualified staff were presented in the course of this study. In a Monroe County demonstration project (locally supported), titled Determining the Effect of Intensive Service to Children From Long-Term Foster Care, one trained child welfare worker with a Master's Degree in Social Work and three years of child welfare experience worked with a total of 83 children over a period of two years. These children had been in care for at least three years and their future was uncertain. The worker's task was to assess their situation and to work with the children and their parents and carry out a permanent plan for each child. In the initial two-year period, 31 children were freed for adoption and petitions had been filed for the freeing of 11 additional children. Twenty-three children were returned to parents or relatives. Six children in their late teens were helped to go on their own; two children were placed in institutions. The status of only ten of the 83 was undetermined at the end of this period. "I have the background and the time needed to work out a plan for each of the children referred to me," the worker explains. "By contract, most foster care workers have no child welfare experience and have a caseload that permits them to deal only with immediate problems."

3. Planning Techniques

Among the agencies surveyed, Monroe County is the only one of the seven public agencies to develop a system for planning which placed the major responsibility on the supervisory staff and which utilizes an internal system for monitoring its children in foster care.

The County's department of social services gives a Foster Care Consultant responsibility for maintaining a control list of the names of children, their workers, and the due dates of their semi-annual reviews of the status of each child. An administrative caseworker is responsible for the distribution of a six-month recording form and for insuring that "in appropriate cases, casework and administrative process for permanent neglect action is set in motion.." In contrast with the public sector, some of New York City's voluntary agencies involve supervisory staff in permanent planning and have internal case tracking systems.

Voluntary agency techniques for involving supervisory staff include the following:

1. Team Approach - supervisors retain direct responsibility for each case and share planning responsibility with caseworkers. Tentative plans are devised with a projected date for carrying out the plan. Every three to four months, plans are reevaluated.

2. Diagnostic Assessment Unit - a separate unit evaluates the needs of each child in care at the time of placement and assesses the strengths and weaknesses of each family. Casework goals are based on this assessment.

3. Administrative Reviews - referral of problem cases for administrative reviews. Often specialized personnel are present at these reviews for consultation - i.e. the attorney, psychiatrist, psychologist.

As part of these techniques, none of which is mutually exclusive, a few agencies report a rigorous system of recording data and the use of a computer print-out to track the status of each child in care.*

4. S.S.C. Monitoring

Because so many foster children are in the care of voluntary agencies in New York City (89 percent of the City's foster care population), New York City's Special Services for Children has a complex monitoring system, one of its main functions being to insure permanent planning by all voluntary child caring agencies. The majority of New York City voluntary agencies visited view S.S.C.'s monitoring system as a major obstacle to early permanent planning.

A child enters foster care in New York City through a central intake unit of S.S.C. which is responsible for doing a psycho-social summary and arriving at a decision as to whether the child should be in long term care. While this information is being gathered, the case is referred to S.S.C.'s Allocation Division of the Office of Allocation and Accountability, which will either refer the child to one of its own direct care units or to a voluntary agency.

The voluntary agency does not have direct planning responsibility until the S.S.C. intake worker completes the plan.

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*These are agency data processing operations, apart from the Child Welfare Information System (CWIS).

The plan is approved by the Accountability Division presumably within 30-60 days. (Teams of workers in the Accountability Division are responsible for monitoring each of the voluntary agencies on a case by case basis.) Voluntary agencies report that they do not get planning responsiblity for as long as six months and some times even longer. (Variation is reported in each borough, and S.S.C. direct services workers similarly complain of delays in receiving plans). Until voluntary agencies have planning responsibility, S.S.C.'s intake unit works with the parent. Agencies report that it is in this initial stage that planning is so crucial because the parent is most receptive at this point. By the time agencies actually get the case, the parent is often confused by the change in caseworker or, at times, the parent has disappeared. Agencies also report that once they do get necessary materials from S.S.C., the materials are not helpful to them in their planning roles. Information provided is sketchy and superficial and agencies then must gather basic information on the problems of the parent and child after such long delays.

Once a case is assigned by S.S.C. for long term planning (i.e. child is found to require long term foster care) voluntary agency workers are required to prepare a W-853 form, a document designed by Special Services for Children and intended as a tool for permanent planning. This form must be submitted annually by the voluntary agencies to the City, for the purpose of foster care review, extended care, and for extension of placement in the case of a court committed child. Accountability Division workers review the plans as described in this form.

Although the "853" form is intended as a tool for permanent planning, it does not focus in on one specific plan (return home, adoption, or continued care) but instead merely requests short-range and long-range goals. The Commission staff reviewed a number of completed "853" forms and found that agencies' responses were often vague, and that it often was difficult to determine the permanent plan for the child. Family Court judges also report that they were unable to understand the agency's plans for the child as reported on this form.

A revised "853" form, scheduled for use in February, 1976 is designed as a tool in planning. The agency worker must select one of three plans (return home, adoption, long-term foster care), explain the reason for choosing it and describe how she/he expects to carry it out. This revised form should help S.S.C. and agency staff make a permanent plan for each child and give useful information to the Accountability team as well as to Family Court judges.

The Commission's Recommendations

Inasmuch as the process of planning for children apparently has not been clearly defined for caseworkers and there is a need to establish action plans to achieve permanent planning, the Commission recommends that, as a first step, the Department of Social Services should convene a group of experts from the social work and psychology fields to develop criteria for making decisions on permanent planning for children. Once such criteria have been developed, the Commission urges that implementing regulations be promulgated.

2. Efforts should be made by State D.S.S. to work with S.S.C. to ease procedural delays and other administrative problems related to S.S.C. supervision of voluntary agencies.

3. State D.S.S. should sponsor a series of demonstration projects to assess the impact of various planning techniques, the use of specialized staff, and methods of management control,and encourage the usage of those patterns found most productive.

III. AGENCY RESOURCES

A. The Attorney

Under the State's current social services system, recent statutory enactments have placed growing reliance on judicial resolution of child welfare issues. Because of this the attorney has become an increasingly important participant in the system. The attorney is indispensible for the legal freeing of a child for adoption, and is a major decision-maker in the process. The agency's attorney decides whether to try a termination of parental rights case, determines the grounds to use, and presents the case in court. Some attorneys interpret the laws to the caseworkers and prepare them to present evidence in court. The attorney should be, and often is, a resource for the agency.

Because of the increased importance of attorneys in proceedings involving the child in foster care, many in the social work field believe that caseworker roles have been minimized and accordingly, feel personally downgraded.

In the public sector, the County Attorney's office operates differently in each of the counties and provides different services. Of the seven public departments of social services participating in this project, agency staff for the most part experienced great difficulty in working with their attorneys and, in only one instance (Westchester County) did agency staff regard the attorney as a positive resource.

1. New York City Public

In New York City, the Legal Services Unit of the Human Resources Administration (HRA) represents the Commission of Social Services and therefore is responsible for all child welfare proceedings for the City's Special Services For Children. This includes termination proceedings and foster care reviews brought by S.S.C.'s direct care unit. On proceedings and reviews brought by the voluntary agencies, an HRA attorney is present on behalf of S.S.C. but does not actively participate.

In describing the role of Legal Services in freeing children, the Assistant Administrator of S.S.C. has written to Project staff that personnel obstacles

> "...are perhaps the most important single factor in the delay that takes place in adoptive planning for foster children. The worst area is probably legal services. Legal action to terminate parental rights takes much too long, sometime as much as several years, mainly because of the shortage of adequate legal staff..."

Caseworkers interviewed in S.S.C.'s direct service units report a delay of two years between their presenting material (including evidence of a diligent search to locate natural parents or other legal guardians) to the legal office and its review by that office. Because of such delays workers complain that they are required to undertake a second diligent search. Some workers find that attorneys are helpful and consult with them for as long as two hours before a contested termination procedure; other caseworkers meet the lawyer for the first time as they enter the courtroom.

The Legal Services Unit analyzed for the Commission the outcome of all termination cases assigned to the Unit in the course of 1973. Out of 114 cases, in only 69 were the children freed as of May 1, 1975. Cases representing 45 children had not been brought to court in at least one and one half years since they had been submitted to the legal unit. Four major reasons were given by Legal Services for this delay:

1. Only one lawyer was assigned to deal with all termination proceedings during 1973.
2. Caseworkers failed to conduct a diligent search.
3. Caseworkers failed to submit the necessary documentation or lost materials.
4. There were court delays; i.e. in signing orders for publication.

The General Counsel of HRA wrote to the Commission that the time taken to process cases has since been reduced. He noted that a review of all City terminations concluded during the period April 28, 1975 through September 11, 1975, regardless of the original date of reference to the City for legal action, showed that 50 percent of such cases are completed within 14 months. He said, "Shortage of legal staffing is not currently a major impediment to the processing and initiation of termination proceedings." Freeing of children has been given priority and six additional attorneys are now responsible for only termination and custody proceedings, he explains.

In early 1975 the Legal Unit gave a series of training sessions for caseworkers on child welfare issues, including such subjects as termination procedures, the interdependence of lawyers and caseworkers, major legal problems, and case law. These workshops were attended by 1,500 caseworkers.

Despite the Legal Unit's recent attempts to speed up the processing of termination cases, caseworkers and supervisors perceive that approximately a two year period elapses before cases are completed and that legal staff are unavailable for consultation.

2. Suffolk County

The Suffolk County Department of Social Services is represented by the County Attorney's office. Legal staff are not welfare attorneys and the Department's work is only one of their many responsibilities. There is no legal representation at foster care review proceedings. Agency staff, from caseworkers to administrators, have had great difficulties in working with the County Attorney's office and are critical of their representatives. One problem cited is lack of county resources: agency staff note that an assistant county attorney was assigned to the Department to specifically deal with child welfare cases for a six month period from September, 1974. This is the only period that agency staff believe they received assistance from the County Attorney's office. Otherwise, workers report they have had to rely completely on a legal availability unit with the Department. This unit, composed of three caseworkers and a supervisor, is highly regarded by agency staff and the Family Court.

In interviews with the Commission,the Suffolk Family Court was also critical of perceived poor performance records, not only of attorneys representing the Department of Social Services, but also of those representing other parties in termination proceedings.

3. Erie County

In Erie County two welfare attorneys on the Department's staff deal exclusively with child welfare cases and one deals with all termination and custody cases. There is no legal representation at foster care review. Interviews with attorneys and child welfare staff indicated a mutual lack of respect, confidence and understanding of one another's efforts and abilities.

4. Chemung County

In Chemung, a part-time welfare attorney is responsible for all child welfare cases and not present at foster care review proceedings unless requested by the public agency. Here too, agency staff are critical of the attorney.

5. Monroe County

In Monroe County, three welfare attorneys are responsible for child welfare cases. An attorney is always present at foster care review hearings and follows up the Court's orders. Agency staff have available a four-page flow chart outlining all the steps for permanent neglect proceedings. Nonetheless, the casework staff do not regard the attorney as helpful and a Monroe Family Court

Judge was critical of both attorneys and caseworkers, and cited a lack of clarity in the respective roles of casework and legal staff in relation to matters before the Court.

6. Onondaga County

In Onondaga County, the welfare attorney deals with all child welfare cases and is present at foster care review hearings. He recently gave a workshop on the permanent neglect statute, has prepared material for department staff, and outlined the documents and evidence that a caseworker should provide. The staff maintain, nonetheless, that he is not available for consultation, and does not adequately prepare them for court appearances.

7. Westchester County

Only in Westchester County have the legal unit and the social services unit appeared to have developed a cooperative relationship. The Senior Assistant County Attorney and her assistant attorneys are seen by caseworkers as leading and assisting them in their efforts to free children. The Senior Assistant County Attorney joined the County Attorney's office in 1974 bringing with her extensive experience in child welfare law, especially in termination proceedings. Six months later she established a legal unit in the County department. After learning that two-thirds of the agency's foster children were potential abandonment cases, she introduced the use of abandonment proceedings for the first time in the recent years in the County. (Prior to this period, the permanent neglect statute was utilized in conjunction with voluntary surrenders.) Such usage entailed securing the cooperation of the Family Court judges, surrogates and the agency staff. A background paper explaining the abandonment statute and procedures was prepared for the judges by this department's legal unit. Substantial assistance was given to the agency staff by the legal unit through workshops and written materials covering the subjects of locating parents, preparation of documents for court termination cases and the philosophy of adoptive planning for children.

8. General Comments on Public Agencies

With the exception of Westchester County administrators and caseworkers in public departments reported that they do not see their attorneys as facilitating the work of the agency. Three major criticisms are cited in most of the counties:

1. Attorneys do not adequately help the caseworkers; are unwilling or have insufficient time to answer their questions or give them information on the evidence required; and do not adequately prepare them for their roles as witnesses in court;

2. Attorneys are more oriented to the procedural requirements of the court than the needs of the children and will only present airtight cases; attorneys often act in a role adversarial to that of the caseworkers; and

3. Attorneys are too preoccupied with emergencies (other cases) to process the flow of termination cases, failing to understand the importance of permanency for the child.

The Commission is cognizant that a number of criticisms levelled here by caseworkers in public agencies against attorneys are unfounded. However, they have been presented because they demonstrate an acute lack of mutual understanding between casework and legal staff of the scope of the roles and responsibilities of each which, must of necessity, differ in orientation and method.

9. New York City Voluntary Agencies

In the New York City voluntary sector, each agency retains one or more legal firms for representation in all legal matters, including child welfare proceedings.

In interviews with all levels of staff at 16 New York City voluntary agencies, a question was asked on how well agency staff work with their attorneys. Agency administrators of 11 agencies said that they had close working relations with their attorneys who: are available for consultation, participate periodically at administrative review meetings, conduct training courses on substantive provisions of the termination statutes, draw up outlines on how to conduct termination procedures for staff use, and prepare staff for court appearances.

In other agencies, caseworkers and /or administrators had reservations about their attorneys, listing such reasons as the unavailability of the attorney until the day of the trial, infrequent meetings with caseworkers, no training of staff by the attorney,and failure of the attorney to report to the caseworker on the status of a case in as long as two years.

A future study may reveal whether there is a relationship between the speed with which cases are processed and intra-agency casework-attorney relationships. At this time it is clear that in 1973, voluntary agencies were more successful in freeing children for adoption than public agencies. Table 11 of Appendix II shows that the court proceedings were more successful for cases brought by voluntary agencies (an 82% success rate compared with 75% success for cases initiated by public agencies surveyed).

One voluntary agency (Little Flower) that has a good working relationship is illustrative of the kind of resource an attorney can be for the agency. The agency's adoption unit is responsible for freeing children for adoption. Its workers state that they are completely comfortable in the courtroom, know that they have the answers to the questions propounded by the court and attorneys, and are not intimidated by the judicial process. The attorney gives periodic training sessions on the provisions of child welfare laws and on how to present evidence in court. Staff enthusiastically describe such innovative training sessions as participation in a videotape of a foster care review hearing and a mock trial of a termination proceeding. The lawyer respects their casework decisions and conveys to them both a commitment to and enthusiasm for their work.

In this agency,it is evident that both caseworkers and attorneys understand the needs and responsibilities of each other and are able to meet them. An attorney from another agency describes how he and many of his colleagues perceive the role of the attorney: "It is my personal feeling with respect to establishment of policy in connection with termination of parental rights, that this should be left for trained social workers and that the attorneys should only participate to the extent of advising whether or not a prima facie case can be made under the existing statutes and what the reasonable probability of success would be in each case." He believes that if the attorney participates in the social work decision, he loses his objectivity about the strength of the evidence. In some agencies, however, the attorneys participate in agency administrative review meetings where a decision is made on whether to terminate parental rights and no dissatisfaction was expressed on any side on the possible merging of roles.

As noted earlier, in both termination of parental rights and foster care review proceedings for children in the care of voluntary agencies, the case is generally presented by the voluntary agency and the lawyer from New York City S.S.C., although present, does not actively participate. The S.S.C. lawyer is present because all children in care are legally in the custody of the New York City Commissioner. Questions have been raised as to why New York City legal staff must spend so much time in court on cases where they play no active role.

Although the relationship between caseworkers and attorneys is far better in voluntary agencies, nevertheless, problems have arisen similar to those in the public sector. Most of the voluntary agencies, however, do not express the frustration voiced by the public sector. Additionally, it should be indicated that attorneys for New York City voluntary agencies are generally more experienced and better paid than their counterparts in the public sector.

Recommendations

1. Judges agree with social services departments that it is often most unsatisfactory for the County Attorney, with his disparate responsibilities and interests to be responsible for the Department's many problems, not the least of which include child welfare. Moreover, the salaries of welfare attorneys are subject to 50 percent State reimbursement under the provisions of the Social Services Law. The utilization of welfare attorneys, the Commission believes, can facilitate the process of freeing children for adoption, which would lead to reductions in State and local foster care costs, (more than matching expenditures for attorney salaries). The Commission therefore recommends that, in upstate communities particularly,

where child welfare legal workloads so merit, that the State Department of Social Services give greater encouragement to the establishment of welfare attorney positions in local departments of social services. Other questions relating to the provision of legal services, such as the adequacy of current fiscal and organizational mechanisms and the development of alternatives thereto, remain unanswered. In this connection, the Commission, under a recent grant from the Edna McConnell Clark Foundation, is undertaking a major study of the provision of legal services in matters involving children in foster care. More definitive recommendations on this highly complex subject will be offered to the State Department of Social Services within a year.

2. Many lawyers believe that caseworkers do not understand the provisions and interpretation of termination statutes and often have difficulty in distinguishing between facts and conclusions. Many judges also state that caseworkers are not sufficiently prepared for their role in presenting evidence in court. Despite instances where attorneys can adequately prepare caseworkers, the Commission believes it is imperative that training programs be developed by State D.S.S. for the purposes of teaching casework staff fundamental provisions and principles of law, including the constitutional concept of "due process", the law of evidence and the distinction between fact and conclusion. In this respect, it would also be beneficial if a compendium of child welfare laws and interpretation of court decisions and other materials were prepared and periodically updated by State D.S.S. The Commission further recommends that State D.S.S. should provide for such education of casework staff in conjunction with county orientation meetings already called for

in Part Two of this Report (The Courts). In such manner, communication channels and effective cooperation, especially between caseworkers and attorneys, can be developed.

3. A related problem concerns the use of case records as potential evidence in the judicial process. In this sense, the casework record serves a dual purpose - a basis for determining the need for and type of social service which should be provided as well as a basis for evidence in judicial proceedings. Problems arise because existing case records consume much staff time and are not standardized throughout the State, or even within a given social services district. In such cases, individual caseworkers often introduce subjective data which may not be appropriate for later judicial consideration, or enter information which on the face contradict previously entered data of other caseworkers. Furthermore, many case records are deficient in that they fail to reflect all relevant personal contacts and other data.

The Commission acknowledges the need for better, more standarized and less time consuming record keeping which should not necessarily preclude interpretive and subjective information. State D.S.S. should work to attain this objective and should draw upon the collective experience of lawyers and social workers in doing so.

4. As noted above, the Commission has ascertained that in New York City, representatives of the Corporation Counsel are present but do not actively participate in termination and foster care review proceedings brought by voluntary agencies. To the extent that the voluntary agency is represented in such proceedings by

its own attorney, the Commission recommends that New York City review the necessity of maintaining its present practice of providing for the representation of the Corporation Counsel at such proceedings.

B. Personnel

1. Patterns of Organization

There are substantial differences among social services agencies in their organization, use of specialized units, the qualifications of caseworkers, and the size of caseloads. Organization structure was not examined in depth in this study, but three particular points may be noted. First, the public agencies of five social services districts (Erie, Chemung, Onondaga, Westchester and New York City) have special divisions for children's services, while Monroe and Suffolk do not. (Suffolk abolished its child welfare unit and decentralized service delivery in January 1975.)

Second, whether or not there is a special children's unit within the agency, the study has found that there is often a problem, perhaps more pronounced in the public agency, in the relationship between the agency's foster care and the adoption units, that impedes the adoption of freed children. Specific problems perceived by foster care or adoption workers include: poor and unsystematic communications between the foster care and adoption units; conflict between the units about the suitability of foster parents as adoptive parents; and the phenomenon of increased numbers of children legally freed for adoption but not placed in adoptive homes.* Another question raised is whether foster care or adoption units should be responsible for the freeing of children; two New York voluntary agencies, St. Dominic's and Little Flower, use the adoption unit for such purposes.

A third significant point concerns use of personnel and the division of labor within an agency's foster care unit. For example, in the voluntary sector, a number of agencies noted recent organization changes whereby different workers were assigned to separately serve the parent or the child in foster care; among the public departments surveyed, this pattern is found only in Suffolk, and , in a modified way, in Monroe. The more common pattern is for a single worker to serve both the child and the parent. There were advantages and disadvantages perceived in both types of practices.

The development of a special agency unit for freeing children for adoption is an aspect of personnel use that was examined more closely, on the assumption that it would bear more directly on the termination of parental rights. Suffolk is the only public agency in the study with a "legal availability unit." This unit was established in December, 1971, when its present supervisor concluded that few termination cases would be brought unless all case documentation and consultation with caseworkers were completed before the cases could be brought to the County Attorney's office. Currently, the unit consists of a supervisor and three assistants, one of whom is responsible for all termination cases, the other two for judicial reviews and foster care reviews respectively. This unit relieves the caseworker of legal documentation in these three areas. The supervisor has given training sessions to casework staff on the provisions of the law, helps them with documenting cases, and prepares them to testify in court. The unit is highly regarded by both agency staff and Family Court judges. Operational results are noteworthy: termination proceedings increased from five in 1971 (prior to the unit's formation) to 30 in 1972.

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*Table 20 in Appendix II shows by agency the number of children freed for adoption but not placed in adoptive homes,and the number placed but not legally adopted as of May 1975.

In the last few years, some New York City voluntary agencies have also developed specialized staff to assist in termination proceedings. The prototype is the Children's Planning Service Unit at New York Foundling, composed of a supervisor and four workers. This unit was established by the agency's attorney and is under his direction; in termination proceedings this unit is the agency's liaison with the attorney and with S.S.C. Its staff does the documentation for court cases and testifies in uncontested cases. In addition, this staff may have direct contact with the natural parent in order to prove diligent effort or to seek a voluntary surrender. Three other voluntary agencies, Cardinal McCloskey, Catholic Home Bureau, and Spence Chapin, have one or more specialized workers to facilitate terminations. Their responsibilities vary from doing only diligent searches to the range of activities described for New York Foundling. In all these agencies, the attorneys and directors attribute the numbers of children freed to the effectiveness and commitment of these specialized workers.

2. Qualifications of Caseworkers

A fundamental question about specialization concerns the caseworker in children's services. Many in the child welfare field believe that child welfare is not now recognized as a professional discipline and that it should be. They point to State Department of Social Services Regulations, which have no special category for child welfare workers; the latter are included within the statewide minimum requirements for all types of caseworkers set forth in such Regulations.
Unless a county department has different, more stringent criteria, it is often obliged to recruit child welfare workers from a civil service list that includes all kinds of caseworkers, some with no qualifications at all in child welfare, many interviewers argue. Merit system seniority rules governing hiring and promotion have also been criticized as creating major difficulties in the recruitment and retention of competent child welfare staff.

An opinion widely expressed by agency administrators and Family Court judges is, first, that many caseworkers are unqualified, inexperienced and unskilled in dealing with the complex problems of children and parents; secondly, that there is a high turnover among them. Ideally, said the Assistant Administrator of New

York City S.S.C., foster care and adoption workers should all have MSW's. In fact, according to one Family Court judge, "Parents express frustration about the youth of workers who have just got out of college and who lack the life experience to understand and help them. They complain about the constant turnover of caseworkers." Some judges complain "The caseworkers don't understand and don't want to understand these sensitive people. They just don't care what they're trained to do. If it's not on the form -- they can't cope with it." Some administrators interviewed attributed the high turnover of caseworkers to the absence of specialist categories that could command higher salaries and therefore help to retain caseworkers in this field.

Agency administrators cited additional evidence that the need for specialization has not been recognized. They believe that graduate schools for social work do not have programs specifically for training child welfare workers. Neither is there adequate on-the-job training with a career ladder, partly for lack of a specialized qualification to work for, partly because State D.S.S. eliminated reimbursement for graduate social work training several years ago. Also, salary patterns for child welfare workers were criticized as inadequate.

3. Caseloads

As noted in various contexts throughout this Report, a major obstacle to freeing children for adoption, in the opinion of social services personnel interviewed by project staff, is heavy caseload per worker.

Although caseloads ranged from sixteen to sixty cases per worker in districts surveyed, all agencies interviewed complained of their own high caseloads.

State D.S.S. Regulation 450.5 prescribes as a staffing standard a maximum of 50 children per worker where a worker provides casework services to the children in foster care and to their parents. As noted earlier, among the public agencies in this study five assign workers to serve both child and parent. The average caseload is highest in Erie and Onondaga Counties where, in each county,the worker is responsible for 60 children. In Chemung, the average caseload is 35 to 50 children; in Westchester it is 40 and in New York City is is 25. In Monroe County, the foster care worker has a caseload of 45 to 50 children and is responsible for the child but can call upon a senior caseworker in another unit to work intensively with the parents. (Suffolk County was unable to provide current caseload data.)

By contrast, in the sixteen voluntary agencies visited, the average caseload per worker is 20 to 25 children, rarely higher. This average is similar to that in S.S.C.'s direct care unit and represents from one-third to one-half the caseloads in public agencies outside New York City. Some voluntary agencies base caseload on family size (e.g. one worker is responsible for ten to 14 families, with an average of 16 children).

Average caseload is one factor that may influence an agency's decision to pursue the time-consuming procedures for court termination of parental rights.

To determine whether there is any relationship between caseload and termination proceedings initiated, the study analyzed data in the 33 voluntary agencies that responded to the survey and the public agencies outside New York City as representing agencies with low and high caseloads respectively. The two groups of agencies were compared in terms of the proportion of their children in foster homes for whom proceedings were initiated in 1973. Table 7 in Appendix II shows no meaningful difference in this respect: the rate for voluntary surrenders and court proceedings initiated in 1973 was 8.6 percent of children in foster care in the upstate public agencies,compared with a 9.6 percent rate in the New York City voluntary agencies. However, there were clear, significant differences in the type of termination sought. Table 2 in Appendix II divides these cases into court terminations and voluntary surrenders agreed to by the parent. The rate of court terminations initiated was more than twice as high in the voluntary agencies as in the upstate public, and voluntary surrenders were much lower in the voluntary agencies than in these public agencies: in the voluntary agencies, almost 57 percent were court terminations and 43 percent voluntary surrenders; in the six upstate public agencies, 25 percent were court terminations and 75 percent were voluntary surrenders. Clearly, the voluntary agencies with smaller average caseload, were more likely to choose the time-consuming route of initiating a court termination, although it cannot be inferred that lower caseload is the only responsible factor. Questions still remain as to why the voluntary agencies did not get more voluntary surrenders, and whether, for example, the voluntary agencies had reservations about pressing the parent to yield the child in some situations.

Further, a number of New York City voluntary agencies (those with large foster care populations and high success rates in freeing children for adoption) were found to have favorable staffing patterns (i.e. relatively low caseloads) in their adoption units with the result that such agencies were better able to place more children in adoptive homes, than the larger upstate public agencies with less favorable staff ratios.

New York City S.S.C. was excluded from these caseload impact comparisons. Despite relatively low average caseloads (tending to group it with New York City voluntary agencies in this respect) New York City initiated relatively few termination actions in 1973 and had a relatively low rate of adoption for freed children, representing a departure from voluntary agency patterns.

The Commission's Recommendations

1. State D.S.S. should closely review agency organization, caseload, and staffing patterns and, within funding limitations, encourage those found to be most productive socially and economically for the freeing of children for adoption, and for the placement of freed children in adoptive homes.

2. The Commission agrees with Project respondents that child welfare work should be recognized as a specialized professional discipline. Accordingly, the Commission recommends that State D.S.S. meet

with the State Department of Civil Service in order to jointly review and revise standards for the selection of caseworkers and to develop a separate testing device for child welfare workers.

3. Further, State D.S.S. should consult with schools of social work to determine the need for additional formal graduate training for child welfare workers.

C. Adoption Subsidy

Adoption subsidy is perceived by the majority of agencies surveyed as a major resource for the placing of children freed for adoption. However, figures show a variation in the use of subsidy by the public sector ranging from no use of subsidy to a 41 percent usage rate (see Appendix II,Table 22). This pattern is in sharp contrast to statements made to the Commission on the advantages of subsidy. For children adopted as a result of proceedings begun in 1973, Table 21 in Appendix II shows that adoption subsidy was only used for 20 percent of the children adopted in the upstate public agencies surveyed as compared with 54 percent of the children in the New York City voluntary agencies reviewed in this study. New York City S.S.C. showed a low use of subsidy (9 percent).

The major problems with the State's adoption subsidy program cited by agencies relate to: the administration of the subsidy program - the intricacies of the State D.S.S. Regulations and subsequent administrative letters which have created administrative difficulties; the complexity of the formula used to determine subsidy; and the limited assistance available from State D.S.S. for resolving difficulties that result from the maze of administrative promulgations on subsidy. As explained by the Assistant

Administrator of New York Special Services for Children in an October 23, 1975 letter to State D.S.S.:

> "It is coming more and more to our attention that people working in the field of adoption have a somewhat fragmented view of what can and cannot be done in matters involving subsidy. There are many exceptions that really need to be granted, but currently a regulation to cover each exception is promulgated. This is creating a subsidized adoption scheme of almost unworkable complexity."

All agencies conveyed the fear of foster parents that subsidy might be discontinued.

Three specific problems most frequently cited in relation to subsidy were: 1) adoptive parents, though given a subsidy, are not provided other benefits for which a foster child qualifies, (particularly provision for medical and special education services); 2) entitlement to medical subsidy is not subject to annual review so that future needs cannot be anticipated; 3) subsidy does not include legal fees incurred by adoptive parents.

One specific problem in New York City was presented by S.S.C.'s Assistant Administrator who noted that its Bureau of Dentistry screens cases of orthondontia before subsidy approval is given. In other medical matters, documentation from the voluntary child-caring agencies is considered sufficient. According to S.S.C. the problem of orthodontia is further complicated by the fact that staff in the Bureau of Dentistry have been drastically reduced, resulting in long waiting lists for purposes of examination. Subsidies reportedly are held up where orthodontia is involved, because of such long waiting periods.

The New York City voluntary agencies' problems with adoption subsidy are compounded by the need for approval by New York City S.S.C. The agencies blame S.S.C. for problems that are inherent in

State regulations. In the words of one agency: "S.S.C.'s overcautiousness about providing for future needs means special services may be more readily attainable through foster care than through adoption with subsidy...There are inconsistencies in interpretation and application of (State) D.S.S.'s unwritten policies...that not only cause confusion and frustration in us but in our families who want and deserve clear and accurate interpretation about adoption subsidy."

Another issue raised by those interviewed relates to the advisability of subsidized adoption without regard to the financial ability of adoptive parents. Some interviewed suggested that subsidy follow the child so that all families, regardl would have the opportunity to adopt.

The Commission's Recommendation

The Temporary Commission, under a grant from the Edna McConnell Clark Foundation is now reviewing the entire subsidy program and will present its recommendations in this area within a year. Pending completion of this review, however, State D.S.S. should at least clarify its existing regulations to the extent that they have created difficulty in administration. Further, State D.S.S. should work with New York City S.S.C. to resolve reported administrative delays in approving adoption subsidy applications.

APPENDIX I

PROPOSED LEGISLATION

The subject matter covered in this Appendix is now included in S.8850 (Pisani, Dunne, Halperin) A.11130 (Gottfried, Passannante).

AN ACT to amend the social services law, the domestic relations law, the family court act, the civil practice law and rules, the judiciary law, the surrogate's court procedure act and the county law, in relation to termination of parental rights, transfer of the care and custody of children, periodic family court review of foster care status, and adoption, child custody and child protective proceedings

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The heading and subdivisions one and two of section three hundred eighty-four of the social services law, as last amended by chapter six hundred eighty-nine of the laws of nineteen hundred sixty-two, are hereby amended to read as follows:

§384. Guardianship and custody of destitute or dependent children; commitment by surrender instrument

1. Method. The guardianship of the person and the custody of a destitute or dependent child under the age of eighteen years may be committed to an authorized agency [either by an order of the surrogate or judge of the family court as hereinafter provided or] by a written instrument which shall be known as a surrender, and signed:

(a) if both parents shall then be living, by the parents of such child, or by the surviving parent, if either parent of such child be dead;

(b) if either one of such parents shall have for a period of six months then next preceding abandoned such child, by the other of such parents;

(c) [if the father of such child shall have neglected to provide for his family during the six months next preceding, or]if such child is born out of wedlock, by the mother of such child;

(d) if both parents of such child are dead, or if such child is born out of wedlock and the mother of such child is dead by the guardian of the person of such child lawfully appointed, with the approval of the court or officer which appointed such guardian to be entered of record;

2. Terms. Such guardianship shall be in accordance with the provisions of this article and the instrument shall be upon such terms[,for such time]and subject to such conditions as may be agreed upon by the parties thereto. [If one of the purposes of such surrender is the adoption of such child from such authorized agency the] The instrument shall [make specific provision therefor and it may] recite that the authorized agency is thereby authorized and empowered to consent to the adoption of such child in the place and stead of the person signing the instrument, and may recite that the person signing the instrument waives any notice of such adoption [; it may also provide for the absolute surrender of such child to such authorized agency]. But no such agency shall draw or receive money from public funds for the support of any such child except upon the written order or permit of the[officer or board legally exercising the powers of a public welfare] social services official of the county[,] or city[or town] sought to be charged with the support of such child.

§2. Subdivisions six and seven of section three hundred eighty-four of such law are hereby REPEALED.

§3. Such law is hereby amended by adding thereto a new *section, to be section* three hundred eighty-four-b, to read as follows:

§384-b. Guardianship and custody of destitute or dependent children; commitment by court order

1. Statement of legislative findings and intent. The legislature hereby finds that many children experience excessively protracted stays in foster care without being adopted or returned to their parents or other custodians. Such excessive stays may deprive these children of positive, nurturing family relationships and have deleterious effects on their development into responsible, productive citizens.

It is the intent of the legislature in enacting this section to provide a fair and timely basis for the freeing of children for adoption in appropriate situations in order to reduce the incidence of harmfully protracted foster care. The legislature intends to protect the constitutional rights of parents. However, it hereby declares that the best interests of children are the paramount concern to the state and that where such best interests are endangered by parental failure to provide a child with a positive, nurturing family relationship, the state may intervene and free the child for adoption in accordance with the provisions of this section.

2. For the purposes of this section, "child" shall mean a person under the age of eighteen years.

3. (a) The guardianship of the person and the custody of a destitute or dependent child may be committed to an authorized agency, or to a foster parent authorized pursuant to section three hundred ninety-two or to section one thousand fifty-five of the family court act to institute a proceeding under this section, by order of a surrogate or judge of the family court, as hereinafter provided.

(b) A proceeding under this section may be originated by an authorized agency or by a foster parent authorized to do so pursuant to section three hundred ninety-two or to section one thousand fifty-five of the family court act.

(c) Proceedings under this section shall be originated in the county in which the authorized agency has an office for the regular conduct of business or in which the child or his parent resides at the time of the initiation of the proceeding.

(d) The family court shall have exclusive, original jurisdiction over any proceeding brought upon grounds specified in paragraphs (c) or (d) of subdivision four of this section, and the family court and surrogate's court shall have concurrent, original jurisdiction over any proceeding brought upon grounds specified in paragraphs (a) or (b) of subdivision four.

(e) A proceeding under this section is originated by a petition on notice served upon the child's parent or parents and upon such other persons as the surrogate or judge may in his discretion prescribe. Such notice shall inform the parents and such other persons that the proceeding may result in an order freeing the child for adoption without the consent of or notice

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to the parents or such other persons. Such notice also shall inform the parents and such other persons of their right to the assistance of counsel, including the right to have counsel assigned by the court in any case where they are financially unable to obtain counsel. When the proceeding is initiated in family court service of the petition and other process shall be made in accordance with the provisions of section six hundred seventeen of the family court act, and when the proceeding is initiated in surrogate's court, service shall be made in accordance with the provisions of section three hundred seven of the surrogate's court procedure act.

(f) In any proceeding under this section in which the surrogate's court has exercised jurisdiction, the provisions of the surrogate's court procedure act shall apply to the extent that they do not conflict with the specific provisions of this section. In any proceeding under this section in which the family court has exercised jurisdiction, the provisions of articles one, two and eleven of the family court act shall apply to the extent that they do not conflict with the specific provisions of this section. Any proceeding originated in family court upon the ground specified in paragraph (d) of subdivision four of this section shall be conducted in accordance with the provisions of part one of article six of the family court act.

(g) An order committing the guardianship and custody of a child pursuant to this section shall be granted only upon a finding that one or more of the grounds specified in paragraphs (a), (b) or (d) of subdivision four are based upon a fair preponderance of the evidence, or upon a finding that one or more

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of the grounds specified in paragraph (c) of subdivision four are based upon clear and convincing proof.

(h) In any proceeding brought pursuant to the provisions of this section, neither the privilege attaching to confidential communications between husband and wife, as set forth in section forty-five hundred two of the civil practice law and rules, nor the physician-patient and related privileges, as set forth in section forty-five hundred four of the civil practice law and rules, nor the psychologist-client privilege, as set forth in section forty-five hundred seven of the civil practice law and rules, nor the social worker-client privilege, as set forth in section forty-five hundred eight of the civil practice law and rules, shall be a ground for excluding evidence which otherwise would be admissible.

(i) In a proceeding instituted by an authorized agency pursuant to the provisions of this section, proof of the likelihood that the child will be placed for adoption shall not be required in determining whether the best interests of the child would be promoted by the commitment of the guardianship and custody of the child to an authorized agency.

(j) The order and the papers upon which it was granted in a proceeding under this section shall be filed in the court, and a certified copy of such order shall also be filed in the office of the county clerk of the county in which such court is located, there to be recorded and to be inspected or examined in the same manner as a surrender instrument, pursuant to the provisions of section three hundred eighty-four.

4. An order committing the guardianship and custody of a child pursuant to this section shall be granted only upon one or more of the following grounds:

(a) Both parents of the child are dead, and no guardian of the person of such child has been lawfully appointed; or

(b) The parent or parents, whose consent to the adoption of the child would otherwise be required in accordance with section one hundred eleven of the domestic relations law, abandoned such child for the period of six months immediately prior to the initiation of the proceeding under this section; or

(c) The parent or parents, whose consent to the adoption of the child would otherwise be required in accordance with section one hundred eleven of the domestic relations law, are presently and for the foreseeable future unable, by reason of mental illness or mental retardation, to provide proper and adequate care for a child who has been in the care of an authorized agency for the period of one year immediately prior to the initiation of the proceeding under this section; or

(d) The child is a permanently neglected child.

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5. (a) For the purposes of this section, a child is "abandoned" by his parent if such parent, while the child is in the care of an authorized agency, evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so. In the absence of evidence to the contrary, such ability to visit and communicate shall be presumed.

(b) The subjective intent of the parent, whether expressed or otherwise, unsupported by evidence of the foregoing parental acts manifesting such intent, shall not preclude a determination that such parent has abandoned his or her child. Such determination shall be made without regard to efforts, if any, by an authorized agency to encourage the parent to perform the acts specified in paragraph (a). Payment by a parent toward the support of the child shall be deemed a communication by such parent with the child or agency.

6. (a) For the purposes of this section, "mental illness" means an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the family court act.

(b) For the purposes of this section, "mental retardation" means subaverage intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the family court act.

(c) The legal sufficiency of the proof in a proceeding upon the ground set forth in paragraph (c) of subdivision four of this section shall not be determined until the judge has taken the testimony of a physician and psychologist, or psychiatrist, in accordance with paragraph (e) of this subdivision.

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(d) A determination or order upon a ground set forth in paragraph (c) of subdivision four shall in no way affect any other right, or constitute an adjudication of the legal status of the parent.

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(e) In every case the judge shall order the parent to be examined by, and shall take the testimony of, a physician and a certified psychologist, in the case of a parent alleged to be mentally retarded, or of a psychiatrist, in the case of a parent alleged to be mentally ill, such physician, psychologist or psychiatrist to be appointed by the court pursuant to section thirty-five of the judiciary law. The parent and the authorized agency shall have the right to submit other psychiatric, psychological or medical evidence. If the parent refuses to submit to such court-ordered examination, or renders himself unavailable therefor, whether before or after the initiation of a proceeding under this section, by departing from the state or by concealing himself therein, the appointed physician, psychologist or psychiatrist, upon the basis of other available information, including, but not limited to, agency, hospital or clinic records, may testify without an examination of such parent, provided that such other information affords a reasonable basis for his opinion.

7. (a) For the purposes of this section, "permanently neglected child" shall mean a child who is in the care of an authorized agency, either in an institution or in a foster home, and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, al-

though physically and financially able to do so, nothwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child.
In the event that the parent defaults after due notice of a proceeding to determine such neglect, such physical and financial ability of such parent may be presumed by the court.

(b) For the purposes of paragraph (a) of this subdivision, evidence of insubstantial or infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child. A visit or communication by a parent with the child which is not of such character as to reasonably demonstrate affectionate and concerned parenthood shall be deemed an insubstantial contact.

(c) As used in paragraph (a) of this subdivision, "to plan for the future of the child" shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent.

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(d) For the purposes of this subdivision:

(i) A parent shall not be deemed unable to maintain contact with or plan for the future of the child by reason of such parent's use of drugs or alcohol, except while the parent is actually hospitalized or institutionalized therefor;

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(ii) A parent shall be deemed unable to maintain contact with or plan for the future of the child while he is actually incarcerated; and

(iii) The time during which a parent is actually hospitalized, institutionalized, or incarcerated shall not interrupt, but shall not be part of, a period of failure to maintain contact with or plan for the future of a child.

(e) Notwithstanding the provisions of paragraph (a) of this subdivision, evidence of diligent efforts by an agency to encourage and strengthen the parental relationship shall not be required when the parent has failed for a period of six months to keep the agency apprised of his or her location.

§4. Subdivisions one and two of section three hundred eighty-four-a of such law, as added by chapter seven hundred ten of the laws of nineteen hundred seventy-five are hereby amended to read as follows:

1. Method. The care and custody of a child may be transferred by a parent or guardian, and the care of a child may be transferred by any person to whom a parent has entrusted the care of the child, to an authorized agency by a written instrument in

accordance with the provisions of this section. Such transfer by a person who is not the child's parent or guardian shall not affect the rights or obligations of the parents or guardian, and such transfer shall be deemed a transfer of the care and custody of the child for the purposes of sections three hundred fifty-eight-a and three hundred ninety-two.

2. Terms. The instrument shall be upon such terms, for such time and subject to such conditions as may be agreed upon by the parties thereto. The department may promulgate suggested terms and conditions for inclusion in such instruments, but shall not require that any particular terms and conditions be included. If the instrument provides that the child is to be returned by the authorized agency on a date certain or upon the occurrence of an identifiable event, such agency shall return such child at such time unless such action would be contrary to court order entered at any time prior to such date or event pursuant to section three hundred[eighty-four] eighty-four-b or section three hundred ninety-two of this chapter or article six or article ten of the family court act or unless there is then pending a proceeding pursuant to such section three hundred eighty-four-b or article six or article ten. The parent or guardian may, upon written notice to such agency, request return of the child at any time prior to the identified date or event, whereupon such agency may, without court order, return the child or, within ten days after such request, may notify the parent or guardian that such request is denied. If such agency denies or fails to act upon such request, the parent or guardian may seek

return of the care and custody of the child by petition in family court for return of such child and order to show cause, or by writ of habeas corpus in the supreme court. If the instrument fails to specify a date or identifiable event upon which such agency shall return such child, such agency shall return the child within ten days after having received notice that the parent or guardian wishes the child returned, unless such action would be contrary to court order entered at any time prior to the expiration of such ten day period pursuant to section three hundred [eighty-four] eighty-four-b or section three hundred ninety-two of this chapter or article six or article ten of the family court act or unless there is pending at the time such notice is received a proceeding pursuant to such section three hundred eighty-four-b or article six or article ten. Expenditures by a social services district for the care and maintenance of a child who has been continued in the care of an authorized agency in violation of the provisions of this subdivision shall not be subject to state reimbursement.

§5. Section three hundred ninety-two of such law, as last amended by chapters seven hundred eight and seven hundred ten of the laws of nineteen hundred seventy-five, is hereby amended to read as follows:

§392. Foster care status; periodic family court review

1. As used in this section, unless otherwise expressly stated or unless the context requires a different interpretation, (a) "foster care" shall mean care provided a child in a foster family free or boarding home, group home, agency boarding home, child care institution, or any combination thereof:

(b) "child" shall mean a child under the age of eighteen years [whose guardianship and custody have been committed to an authorized agency pursuant to section three hundred eighty-four of this chapter by an order of a surrogate or judge of the family court or by a surrender instrument, or whose care and custody have been transferred to an authorized agency by an instrument executed pursuant to section three hundred eighty-four-a of this chapter, or whose custody has been temporarily or permanently awarded to an authorized agency by a judge of the family court pursuant to a finding that the child is a permanently neglected child as defined in section six hundred eleven of the family court act] for whom an authorized agency is providing foster care, and who has not been legally freed for adoption, except a child who is in the care of an authorized agency pursuant to court order under article seven or ten of the family court act.

2. Where a child has remained in foster care for a continuous period of eighteen months a petition to review the foster care status of such child:

(a) shall be filed in the family court by the authorized agency charged with the care [,] and custody [or guardianship] of such child;

(b) may be filed by another authorized agency having the supervision of such foster care;

(c) may be filed by the foster parent or parents in whose home the child resides or has resided during such period of eighteen months.

In the event that foster care of a child [in foster care is returned to his parent or parents] is discontinued and, within three months [of such return,] thereafter the child is again placed under the care of an authorized agency, [such period of return] the period during which the child was not in foster care shall not constitute an interruption of continuous foster care for the purposes of review pursuant to this section. However, [the] such period [of return] shall not be considered to be a part of any continuous period of foster care for the purposes of determining the length of time that a child may have been in foster care.

3. Such petition:

(a) shall be filed in the family court in the county in which the authorized agency charged with the care[,] and custody [or guardianship] of such child has its principal office or where the child resides;

(b) shall set forth the disposition sought and the grounds therefor;

(c) shall, when filed by an authorized agency and notice is to be given to a parent, guardian or relative of the child, omit, for good cause shown, the name and address of the foster parent or parents with whom such child is residing at the time of the filing of the petition, and, in lieu thereof, there shall be filed with such petition a verified schedule executed by such agency setting forth the name and address of such foster parent or parents.

4. Notice of the hearing, including a statement of the dispositional alternatives of the court, shall be given and a

copy of the petition shall be served upon the following, each of whom shall be a party entitled to participate in the proceeding:

(a) the authorized agency charged with the care[,] and custody [or guardianship] of such child, if such authorized agency is not the petitioner;

(b) the authorized agency having supervision of such foster care, if such authorized agency is not the petitioner;

(c) the foster parent or parents in whose home the child resided or resides at or after the expiration of a continuous period of eighteen months in foster care;

(d) the child's parent or guardian who transferred the care and custody of such child temporarily to an authorized agency;

(e) such other persons as the court may, in its discretion, direct.

5. Service of notice of the hearing and the petition shall be made in such manner and on such notice as the court may, in its discretion,prescribe.

6. The court may, in its discretion, dispense with the attendance of the child at the hearing or may, with the consent of the parties, dispense with the hearing and make a determination based upon papers and affidavits submitted to the court.

7. At the conclusion of such hearing, the court shall, upon the proof adduced, in accordance with the best interest of the child, enter an order of disposition:

(a) directing that foster care of the child be continued; or

(b) [in the case of a child who has been committed temporarily to the care of an authorized agency by a parent, guardian or relative,] directing that the child be returned to [such] the parent, guardian or relative; or

(c) [in the case of a child who has been committed temporarily to the care of an authorized agency by a parent, guardian or relative,] directing [that the] any agency specified in subdivision four to institute a proceeding, pursuant to section three hundred eighty-four-b of this chapter, to legally free such child for adoption, if the court finds reasonable cause to believe that grounds therefor exist. [and upon] Upon a failure by such agency to institute such a proceeding within [thirty] ninety days after entry of such order, [permitting] the court shall permit the foster parent or parents in whose home the child resides to institute such a proceeding unless the agency, for good cause shown and upon due notice to all parties to the proceeding, has obtained a modification or extension of such order, or unless the court has reasonable cause to believe that such foster parent or parents would not obtain approval of their petition to adopt the child in a subsequent adoption proceeding. [; or

(d) in the case of a child whose guardianship and custody have been committed to an authorized agency by an order of a surrogate or judge of the family court or by a surrender instrument or who has been judicially declared to be a permanently neglected child, directing that such child be placed for adoption in the foster family home where he resides or has resided or with any other person or persons.]

An order of disposition entered pursuant to this subdivision shall include the court's findings supporting its determination that such order is in accordance with the best interest of the child. If the court promulgates separate findings of fact or conclusions of law, or an opinion in lieu thereof, the order of disposition may incorporate such findings and conclusions, or opinions, by reference.

8. The court may make an order of protection in assistance or as a condition of any other order made under this section. The order of protection may set forth reasonable conditions of behavior to be observed for a specified time by a person or agency who is before the court[and may require any such person or agency to make periodic reports to the court containing such information as the court in its discretion may prescribe].

9. The court may make an order directing an authorized agency to undertake diligent efforts to encourage and strengthen the parental relationship when it finds such efforts will not be detrimental to the[moral and temporal welfare] best interests of the child. Such order may include a specific plan of action for the authorized agency including, without limitation, requirements that such agency assist the parent in obtaining adequate housing, employment, counselling, medical care or psychiatric treatment.

10. The court shall possess continuing jurisdiction in proceedings under this section and, in the case of children who are continued in foster care, shall rehear the matter whenever it deems necessary or desirable, or upon petition by any party entitled to notice in proceedings under this section, but at least [every] within twenty-four months after the entry of the last previous order of disposition pursuant to subdivision seven of this section.

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11. In any proceeding brought pursuant to the provisions of this section, neither the privilege attaching to confidential communications between husband and wife, as set forth in section forty-five hundred two of the civil practice law and rules, nor the physician-patient and related privileges, as set forth in section forty-five hundred four of the civil practice law and rules, nor the psychologist-client privilege, as set forth in section forty-five hundred seven of the civil practice law and rules, nor the social worker-client privilege, as set forth in section forty-five hundred eight of the civil practice law and rules, shall be a ground for excluding evidence which otherwise would be admissible.

§6. Paragraph (f) of subdivision six of section three hundred ninety-eight of such law, as amended by chapter eight hundred thirty-nine of the laws of nineteen hundred sixty-eight, is hereby amended to read as follows:

(f) When in his judgment it is advisable for the welfare of the child, accept the surrender of a child by an instrument in writing in accordance with the provisions of this chapter. Any inconsistent provision of law notwithstanding, the acceptance by the social services official of [an absolute] a surrender of a child born out of wedlock from the mother of such child shall relieve her from any and all liability for the support of such child.

§7. Subdivision two of section three hundred seventy-one of such law, as amended by chapter six hundred forty of the laws of nineteen hundred sixty-nine, is hereby amended to read as follows:

2. "Abandoned child" means a child under the age of eighteen years who is abandoned [or deserted in any place] by both parents, or by the parent having its custody, or by any other person or persons lawfully charged with its care or custody [, and left

(a) in destitute circumstances, or

(b) without proper food, shelter or clothing, or

(c) without being visited or having payments made toward his support, for a period of at least six months, by his parent, guardian or other lawful custodian without good reason] ,in accordance with the definition and other criteria set forth in subdivision five of section three hundred eighty-four-b;

§8. Subdivision seven of section one hundred nine of the domestic relations law, as added by chapter seven hundred seventeen of the laws of nineteen hundred sixty, is hereby amended to read as follows:

7. "A child who has been surrendered to an authorized agency for the purpose of adoption" shall mean a child who has been surrendered to such an agency [for the purpose of adoption or absolutely] pursuant to the provisions of section three hundred eighty-four of the social[welfare] services law.

§9. Section one hundred eleven of such law, as last amended by chapters two hundred forty-six and seven hundred four of the laws of nineteen hundred seventy-five, is hereby amended to read as follows:

§111. Whose consent required

1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

[1.] (a) Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

[2.] (b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

[3.] (c) Of the mother, whether adult or infant, of a child born out of wedlock;

[4.] (d) Of any person or authorized agency having lawful custody of the adoptive child.

2. The consent shall not be required of a parent or of any other person having custody of the child:

(a) who evinces an intent to forego his or her parental or custodial rights and obligations as manifested by his or her failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, although able to do so; or

(b) who has surrendered the child to an authorized agency [for the purpose of adoption] under the provisions of section three hundred eighty-four of the social services law; or

(c) for whose child a guardian has been appointed under the provisions of section three hundred [eighty-four] eighty-four-b of the social services law or article ten of the family court act; or

(d) who has been deprived of civil rights pursuant to the civil rights law and whose civil rights have not been restored; or

(e) who [is insane or who has been judicially declared incompetent or who is mentally retarded as defined by the mental hygiene law or who has been adjudged to be an habitual drunkard or who has been judicially deprived of the custody of the child on account of cruelty or neglect, or pursuant to a judicial finding that the child is a permanently neglected child as defined in section six hundred eleven of the family court act of the state of New York], by reason of mental illness or mental retardation, as defined in subdivision six of section three hundred eighty-four-b of the social services law, is presently and for the foreseeable future unable to provide proper care for the child. The determination as to whether a parent is mentally ill or mentally retarded shall be made in accordance with the criteria and procedures set forth in subdivision six of section three hundred eighty-four-b of the social services law. [; except that notice]

3. Notice of the proposed adoption shall be given in such manner as the judge or surrogate may direct and an opportunity to be heard thereon may be afforded to a parent who has been deprived of civil rights and to [a] any other parent whose consent to adoption may not be required pursuant to subdivision two, if the judge or surrogate so orders. Notwithstanding any other provision of law, neither the notice of a proposed adoption nor any process in such proceeding shall be required to contain the name of the person or persons seeking to adopt the child. [For the purposes of this section, evidence of insubstantial and infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a finding that such parent has abandoned such child.]

4. Where the adoptive child is over the age of eighteen years the consents specified in [subdivisions two and three] paragraphs (b) and (c) of subdivision one of this section shall not be required, and the judge or surrogate in his discretion may direct that the consent specified in [subdivision four] paragraph (d) of subdivision one of this section shall not be required if in his opinion the [moral and temporal] best interests of the adoptive child will be promoted by the adoption and such consent cannot for any reason be obtained.

5. An adoptive child who has once been lawfully adopted may be readopted directly from such child's adoptive parents in the same manner as from its natural parents. In such case the consent of such natural parents shall not be required but the judge or surrogate in his discretion may require that notice be given to the natural parents in such manner as he may prescribe.

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6. For the purposes of paragraph (a) of subdivision two:

(a) In the absence of evidence to the contrary, the ability to visit and communicate with a child or person having custody of the child shall be presumed.

(b) Evidence of insubstantial or infrequent visits or communication by the parent or other person having custody of the child shall not, of itself, be sufficient as a matter of law to preclude a finding that the consent of such parent or person to the child's adoption shall not be required.

(c) The subjective intent of the parent or other person having custody of the child, whether expressed or otherwise, unsupported by evidence of acts specified in paragraph (a) of subdivision two manifesting such intent, shall not preclude a

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determination that the consent of such parent or other person to the child's adoption shall not be required.

(d) Payment by a parent toward the support of the child of a fair and reasonable sum, according to the parent's means, shall be deemed a substantial communication by such parent with the child or person having legal custody of the child.

§10. Subdivision three of section one hundred twelve of such law, as amended by chapter five hundred seventy of the laws of nineteen hundred seventy, is hereby amended to read as follows:

3. The authorized agency must present to such judge or surrogate a schedule to be annexed to the petition which shall be verified by a duly constituted official of the authorized agency having custody of the adoptive child or actually placing the child for adoption and shall contain (1) the full name of the child, (2) the manner in which the authorized agency obtained custody of the adoptive child, (3) the facts, if any, which render unnecessary the consent of either or both of the parents of the adoptive child, (4) a statement whether either parent had ever requested the agency to return the child to the parent, within thirty days of the execution and delivery of an instrument of [adoption] surrender to an authorized agency and, if so, all facts relating thereto. If a request for return of the child to a parent be made after the presentation to the court of the petition and schedule, the authorized agency shall promptly report to the court in writing the facts relating thereto and (5) all available information comprising the child's medical history.

§11. Section one hundred fourteen of such law, as last amended by chapters two hundred sixty-one and one thousand eleven of the laws of nineteen hundred seventy-four, is hereby amended to read as follows:

§114. Order of adoption

If satisfied that the [moral and temporal] best interests of the adoptive child will be promoted thereby the judge or surrogate shall make an order approving the adoption and directing that the adoptive child shall thenceforth be regarded and treated in all respects as the child of the adoptive parents or parent. In determining whether the [moral and temporal] best interests of the adoptive child will be promoted by the adoption, the judge or surrogate shall give due consideration to any assurance by a commissioner of social services that he will provide necessary support and maintenance for the adoptive child pursuant to the social services law. Such order shall contain the full name, date and place of birth and reference to the schedule annexed to the petition containing the medical history of the child in the body thereof and may direct that the child's medical history be furnished to the adoptive parents. If the judge or surrogate is also satisfied that there is no reasonable objection to the change of name proposed, the order shall direct that the name of the adoptive child be changed to the name stated in the agreement of adoption and that henceforth he shall be known by that name. All such orders made by a family court judge of Westchester county since September first nineteen hundred sixty-two, and on file in the office of the county clerk of such county shall be transferred to the clerk of the family court of such county. Such order and all the papers in the proceeding shall be filed in the office of the court granting the adoption and the order shall be entered in books which shall be kept under seal and which shall be indexed by the name of the adoptive parents and by the full original name of the child. Such order, including orders heretofore entered, shall be subject to inspection and examination only as hereinafter provided. Notwithstanding the fact that adoption records shall be sealed and secret, they may be microfilmed and processed pursuant to an order of the court, provided that such order provides that the confidentiality of such records be maintained. If the confidentiality is violated, the person or company violating it can be found guilty of contempt of court. The fact that the adoptive child was born out of wedlock shall in no case appear in such order. The written report of the investigation together with all other papers pertaining to the adoption shall be kept by the judge or surrogate as a permanent record of his court and such papers must be sealed by him and withheld from inspection. No certified copy of the order of adoption shall issue unless authorized by court order, except that certified copies may issue to the agency or agencies in the proceeding prior to the sealing of the papers. Before the record is sealed, such order may be granted upon written ex parte application on good cause shown and upon such conditions as the court may impose. After the record is sealed, such order may be granted only upon notice as hereinafter provided for disclosure or access and inspection of records. The clerk upon request of a person or agency entitled thereto shall issue certificates of adoption which shall contain only the new name of the child and the date and place of birth of the child, the name of the adoptive parents and the date when and court where the adoption was granted, which certificate as to the facts recited therein shall have the same force and effect as a certified copy of an order of adoption.

No person, including the attorney for the adoptive parents shall disclose the surname of the child directly or indirectly to the adoptive parents except upon order of the court. No person shall be allowed access to such sealed records and order and any index thereof except upon an order of a judge or surrogate of the court in which the order was made or of a justice of the supreme court. No order for disclosure or access and inspection shall be granted except on good cause shown and on due notice to the adoptive parents and to such additional persons as the court may direct.

In like manner as a court of general jurisdiction exercises such powers, a judge or surrogate of the court in which the order of adoption was made may open, vacate or set aside such order of adoption for fraud, newly discovered evidence or other sufficient cause.

§12. Subdivision five of section one hundred fifteen of such law, as added by chapter one hundred forty-seven of the laws of nineteen hundred sixty-one, is hereby amended to read as follows:

5. Where the petition alleges that either or both of the natural parents of the child have been deprived of civil rights or [have been judicially declared incompetent or have been adjudged to be habitual drunkards] are mentally ill or mentally

retarded, proof shall be submitted that such disability exists at the time of the proposed adoption.

§13. Subdivision four of section one hundred sixteen of such law, as added by chapter one hundred forty-seven of the laws of nineteen hundred sixty-one, is hereby amended to read as follows:

4. Stage two of private-placement adoption. If the judge or surrogate has found that there has been compliance with all the requirements hereof and is satisfied that the [moral and temporal] best interests of the child will be promoted by granting an order of adoption, the provisions of section one hundred fourteen of title two of this article shall apply.

§14. Section six hundred eleven of the family court act, as last amended by chapters seven hundred and seven hundred four of the laws of nineteen hundred seventy-five, is hereby amended to read as follows:

§611. Permanently neglected child; purpose of part

[A "permanently neglected child" is a person under eighteen years of age who is in the care of an authorized agency, either in an institution or in a foster home, and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the moral and temporal welfare of the child. In the event that the parent defaults after due notice of a proceeding to determine such neglect, such physical and financial ability of such parent may be presumed by the court. For the purposes of this section, evidence of insubstantial and infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child.]

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The purpose of this part is to provide the procedures for proceedings initiated in family court, pursuant to section three hundred eighty-four-b of the social services law, for the commitment of the guardianship and custody of a child upon the ground that the child is a permanently neglected child. As used in this part "permanently neglected child" shall mean permanently neglected child as defined in subdivision seven of section three hundred eighty-four-b of the social services law, and unless the context requires otherwise, the provisions of such section three hundred eighty-four-b shall be deemed applicable requirements in addition to the procedures contained in this part. All references in this part to petitions and proceedings initiated "under this part" shall be deemed references to petitions and proceedings initiated under section three hundred eighty-four-b of the social services law upon the ground that the child is a permanently neglected child.

§15. Sections six hundred twelve, six hundred thirteen and six hundred fifteen of such act are hereby REPEALED.

§16. Section six hundred fourteen of such act, as last amended by chapters seven hundred and seven hundred one of the laws of nineteen hundred seventy-five, is hereby amended to read as follows:

§614. Originating proceeding [permanently to terminate] for the commitment of the guardianship and custody of a permanently neglected child

1. A proceeding [permanently to terminate the parent's or other custodian's] for the commitment of the guardianship and custody of a child on the ground of permanent neglect is originated by a petition, alleging:

(a) the child is a person under eighteen years of age;

(b) the child is in the care of an authorized agency, [either in an institution or in a foster home] in a foster family free or boarding home, group home, agency boarding home, child care institution, or any combination thereof;

(c) the authorized agency has made diligent efforts to encourage and strengthen the parental relationship and specifying the efforts made or that such efforts would be detrimental to the [moral and temporal welfare] best interests of the child and specifying the reasons therefor;

(d) the parent or custodian, notwithstanding the agency's efforts, has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so; and

(e) the best interests of the child require that the [parents' or other custodian's] guardianship and custody of the child be [terminated permanently] committed to an authorized agency or to a foster parent authorized to originate this proceeding under section three hundred ninety-two of the social services law or section one thousand fifty-five of this act.

2. Where the petitioner is not the authorized agency, allegations relating to the efforts of the authorized agency may be made upon information and belief.

§17. Section six hundred sixteen of such act is hereby amended to read as follows:

§616. Issuance of summons

On the filing of a petition under this part, the court may cause a copy of the petition and a summons to be issued, requiring the parent to show cause why the court should not enter an order [depriving the parent of all rights of] committing the guardianship and custody of the child [and awarding custody of such child] to the petitioner for the reason that the child is permanently neglected.

§18. Subdivision (c) of section six hundred seventeen of such act, as amended by chapter seven hundred sixty-nine of the laws of nineteen hundred sixty-nine, is hereby amended to read as follows:

(c) Personal service within or without the state or in a foreign county [and service by publication] shall be made in accordance with the provisions of section three hundred seven of the surrogate's court procedure act, as the same may be amended from time to time, with respect to service of a citation. [The judge shall have such authority with respect to modes of service of summons by publication as is granted to the surrogate with respect to modes of service of a citation by publication, except that, unless otherwise ordered by the judge, publication in one newspaper designated in the order shall be sufficient.]

§19. Section six hundred seventeen of such act is hereby amended by adding thereto a new subdivision, to be subdivision (d),to read as follows:

(d) Service of the petition and other process by publication shall be made in accordance with the provisions of CPLR 316, provided, however, that a single publication in only one newspaper designated in the order shall be sufficient.

§20. Section six hundred twenty-two of such act, as amended by chapter five hundred twenty-nine of the laws of nineteen hundred sixty-three, is hereby amended to read as follows:

§622. Definition of "fact-finding hearing"

When used in this part, "fact-finding hearing" means in the case of a petition [permanently to terminate] for the commitment of the guardianship and custody of a child, a hearing to determine whether the allegations required by paragraphs (a), (b), (c), and (d) of section six hundred fourteen are supported by a fair preponderance of the evidence.

§21. Section six hundred twenty-three of such act is hereby amended to read as follows:

§623. Definition of "dispositional hearing"

When used in this part, "dispositional hearing" means a hearing to determine [whether the interests of the child require that the parent's custody or the custody of another person responsible for the care of the child be terminated permanently and, if so,] what order of disposition should be made in accordance with the best interests of the child.

§22. Section six hundred twenty-four of such act, as amended by chapter five hundred twenty-nine of the laws of nineteen hundred sixty-three, is hereby amended to read as follows:

§624. Evidence

Only competent, material and relevant evidence may be admitted in a fact-finding hearing; only material and relevant evidence may be admitted in a dispositional hearing. Evidence of parental contact or of failure to maintain contact with a child subsequent to the date of the filing of a petition under this part shall be inadmissible in the fact-finding hearing. Such evidence may be admitted in the dispositional hearing but shall not, of itself, be sufficient as a matter of law to preclude or require an order committing the guardianship and custody of the child.

§23. Section six hundred twenty-five of such act, as amended by chapter five hundred twenty-nine of the laws of nineteen hundred sixty-three, is hereby amended to read as follows:

§625. Sequence of hearings

(a) Upon completion of the fact-finding hearing, the dispositional hearing may commence immediately after the required findings are made; provided, however, that if all parties consent the court may, upon motion of any party or upon its own motion, dispense with the dispositional hearing and make an order of disposition on the basis of competent evidence admitted at the fact-finding hearing.

(b) Reports prepared by the probation service or a duly authorized agency for use by the court prior to the making of an order of disposition shall be deemed confidential information furnished to the court which the court in a proper case may, in its discretion, withhold from or disclose in whole or in part to the law guardian, counsel, party in interest, or other appropriate person. Such reports may not be furnished to the court prior to the completion of a fact-finding hearing, but may be used in a dispositional hearing or in the making of an order of disposition without a dispositional hearing pursuant to subdivision (a).

§24. Section six hundred thirty-one of such act, as amended by chapter seven hundred one of the laws of nineteen hundred seventy-five, is hereby amended to read as follows:

§631. Disposition on adjudication of permanent neglect

At the conclusion of a dispositional hearing on a petition [permanently to terminate] for the commitment of the guardianship and custody of a child, the court shall enter an order of disposition:

(a) dismissing the petition in accord with section six hundred thirty-two; or

(b) suspending judgment in accord with section six hundred thirty-three; or

(c) [permanently terminating custody of the parent or other person responsible for the care of the child and awarding] committing the guardianship and custody of the child in accord with section six hundred thirty-four.

An order of disposition shall be made, pursuant to this section, solely on the basis of the best interests of the child, and there shall be no presumption that such interests will be promoted by any particular disposition.

§25. Section six hundred thirty-four of such act is hereby amended to read as follows:

§634. [Permanent termination of] Commitment of guardianship and custody; further orders

[If the] The court may enter [enters] an order under section six hundred thirty-one [permanently terminating custody, it may enter an order temporarily or permanently awarding] committing the guardianship and custody of the child to the petitioner on such conditions, if any, as it deems proper.

§26. Such act is hereby amended by adding thereto a new section, to be section six hundred fifty-five, to read as follows:

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§655. Custody proceedings; privileged communications; best interests of child

1. In any action or proceeding in family court for the determination of the custody of a child, neither the privilege attaching to confidential communications between husband and wife, as set forth in section forty-five hundred two of the civil prac-

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tice law and rules, nor the physician-patient and related privileges, as set forth in section forty-five hundred four of the civil practice law and rules, nor the psychologist-client privilege, as set forth in section forty-five hundred seven of the civil practice law and rules, nor the social worker-client privilege, as set forth in section forty-five hundred eight of the civil practice law and rules, shall be a ground for excluding evidence which otherwise would be admissible.

2. In any action or proceeding in family court for the determination of the custody of a child, such custody shall be awarded solely on the basis of the best interests of the child, and there shall be no presumption that such interests will be promoted by any particular custodial disposition.

§27. Paragraphs (iii) and (iv) of subdivision (a) of section two hundred sixty-two of such act, as added by chapter six hundred eighty-two of the laws of nineteen hundred seventy-five, is hereby amended to read as follows:

(iii) the respondent in any proceeding under [parts one and] part three of article six of this act;

(iv) the parent, foster parent, or other person having physical or legal custody of the child in any proceeding under section three hundred fifty-eight-a, three hundred eighty-four, three hundred eighty-four-b, or three hundred ninety-two of the social services law;

§28. Paragraph (ii) of subdivision (f) of section one thousand twelve of such act, as added by chapter nine hundred sixty-two of the laws of nineteen hundred seventy, is hereby amended to read as follows:

(ii) who has been abandoned, in accordance with the definition and other criteria set forth in subdivision five of section three hundred eighty-four-b of the social services law, by his parents or other person legally responsible for his care.

§29. Section one thousand thirty-one of such act is hereby amended by adding thereto a new subdivision, to be subdivision (d), to read as follows:

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(d) A proceeding under this article may be originated by a child protective agency pursuant to section one thousand thirty-two, notwithstanding that the child is in the care and custody of such agency. In such event, the petition shall allege facts sufficient to establish that the return of the child to the care and custody of his parent or other person legally responsible for his care would place the child in imminent danger of becoming an abused or neglected child.

§30. Paragraph (v) of subdivision (a) of section one thousand fifty-two of such act, as amended by chapter one thousand thirty-nine of the laws of nineteen hundred seventy-three, is hereby amended to read as follows:

(v) placing the respondent under supervision in accord with section one thousand fifty-seven [.] ; or

§31. Subdivision (a) of section one thousand fifty-two of such act is hereby amended by adding thereto a new paragraph, to be paragraph (vi), to read as follows:

(vi) committing the guardianship and custody of the child in accord with section one thousand fifty-eight.

§32. Section one thousand fifty-two of such act is hereby amended by adding thereto a new subdivision, to be subdivision (c), to read as follows:

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(c) In entering an order of disposition pursuant to paragraph (i), (ii), (iii), (iv) or (v) of subdivision (a) of this section, the court shall advise the respondent that any subsequent adjudication of child abuse arising out of acts of the respondent may result in the commitment of the guardianship and custody of the child pursuant to section one thousand fifty-eight.

§33. Section one thousand fifty-eight of such act, as added by chapter nine hundred sixty-two of the laws of nineteen hundred seventy, is hereby amended to read as follows:

§[1058] 1059. Abandoned child. If the court finds that a child was abandoned by his parents or by the other person lawfully charged with his care, it may make an order so finding and may discharge the child to the custody of the commissioner of social services [or to such other officer, board or department as may be authorized to receive children as public charges,] who shall provide for such child as in the case of a destitute child or as otherwise authorized by law. In such case the court shall direct the commissioner to institute a proceeding pursuant to section three hundred eighty-four-b of the social services law to legally free such child for adoption.

§34. Such act is hereby amended by adding thereto a new section, to be section one thousand fifty-eight, to read as follows:

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§1058. Commitment of guardianship and custody.

For purposes of section one thousand fifty-two, the court may commit the guardianship and custody of the child to a duly authorized agency upon a finding, based on clear and convincing, competent, material and relevant evidence introduced in the dispositional hearing, that the best interests of the child require that such action be taken, and that

(a) the child or another child for whose care the respondent is or has been legally responsible has previously been found to be an abused child as a result of the respondent's acts and that reasonable efforts to rehabilitate the respondent have been unsuccessful and are unlikely to be successful in the foreseeable future; or

(b) the child has been found to be an abused child as a result of acts of the respondent evincing a depraved indifference to human life.

§35. The civil practice law and rules is hereby amended by adding thereto a new section, to be section seven thousand thirteen, to read as follows:

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§7013. Custody proceedings; privileged communications; best interests of child

1. In any proceeding pursuant to this article for the determination of the custody of a minor, neither the privilege attaching to confidential communications between husband and wife, as set forth in section forty-five hundred two of the civil practice law and rules, nor the physician-patient and related privileges, as

set forth in section forty-five hundred four of the civil practice law and rules, nor the psychologist-client privilege, as set forth in section forty-five hundred seven of the civil practice law and rules, nor the social worker-client privilege, as set forth in section forty-five hundred eight of the civil practice law and rules, shall be a ground for excluding evidence which otherwise would be admissible.

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2. In any proceeding pursuant to this article for the determination of the custody of a minor, such custody shall be awarded solely on the basis of the best interests of the minor, and there shall be no presumption that such interests will be promoted by any particular custodial disposition.

§36. Subdivision one of section thirty-five of the judiciary law, as last amended by chapters six hundred eighty-two and seven hundred six of the laws of nineteen hundred seventy-five, is hereby amended to read as follows:

1. a. When a court orders a hearing in a proceeding upon a writ of habeas corpus to inquire into the cause of detention of a person in custody in a state institution, or when it orders a hearing in a civil proceeding to commit or transfer a person to or retain him in a state institution when such person is alleged to be mentally ill, mentally defective or a narcotic addict, or when it orders a hearing for the commitment of the guardianship and custody of a child to an authorized agency by reason of the mental illness or mental retardation of a parent,

or when it orders a hearing to determine whether consent to the adoption of a child shall be required of a parent who is alleged to be mentally ill or mentally retarded, the court may assign counsel to represent such person if it is satisfied that he is financially unable to obtain counsel. Upon an appeal taken from an order entered in any such proceeding, the appellate court may assign counsel to represent such person upon the appeal if it is satisfied that he is financially unable to obtain counsel.

b. Upon an appeal in a criminal action or in a proceeding in the family court or surrogate's court wherein the defendant or person entitled to counsel pursuant to the family court act or surrogate's court procedure act, is financially unable to obtain counsel, the court of appeals or the appellate division of the supreme court may assign counsel other than in the manner as is prescribed in section seven hundred twenty-two of the county law only when it is satisfied that special circumstances require such assignment.

§37. Paragraph (a) of subdivision two of section three hundred seven of the surrogate's court procedure act is hereby amended by adding thereto a new subparagraph, to be subparagraph (iv), to read as follows:

(iv) In an adoption proceeding under article seven of the domestic relations law or in a proceeding under section three hundred eighty-four-b of the social services law, a single publication in only one newspaper shall be required.

§38. The article heading of article four of such act is hereby amended to read as follows:

APPEARANCE; PROTECTION OF PERSONS UNDER DISABILITY; COUNSEL FOR INDIGENT ADULTS IN SURROGATE'S COURT PROCEEDINGS

§39. Such act is hereby amended by adding thereto a new section, to be section four hundred seven, to read as follows:

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§407. Assignment of counsel for indigent persons. 1. Each of the persons described below in this subdivision has the right to the assistance of counsel. When such person first appears in court, the surrogate shall advise such person before proceeding that he has the right to be represented by counsel of his own choosing, of his right to have an adjournment to confer with counsel, and of his right to have counsel assigned by the court in any case where he is financially unable to obtain the same:

(i) the respondent in any proceeding under section three hundred eighty-four-b of the social services law;

(ii) the respondent in any proceeding for the approval of a surrender instrument under section three hundred eighty-four of the social services law;

(iii) the parent of a child in any adoption proceeding who opposes the adoption of such child;

(iv) any of the above persons upon an appeal in any of the above proceedings.

2. Any order for the assignment of counsel issued under this section shall be implemented as provided in article eighteen-B of the county law.

§40. Subdivision three of section seventeen hundred four of such act is hereby amended to read as follows:

3. Whether the infant has had at any time a guardian appointed by will or deed or an acting guardian in socage or a guardian of the person appointed pursuant to section 384 or section 384-b of the social [welfare] services law or section 1058 of the family court act.

§41. Subdivision two of section seventeen hundred five of such act is hereby amended to read as follows:

2. No process shall be necessary to a parent who has abandoned the infant or is deprived of civil rights or divorced from the parent having legal custody of the infant or an incompetent [or habitual drunkard] or who is otherwise judicially deprived of the custody of the infant or in case the infant is a married woman, to a husband who has abandoned her or is deprived of civil rights or divorced or an incompetent [or habitual drunkard].

§42. Subdivision two of section seven hundred seventeen of the county law, as amended by chapter six hundred eighty-two of the laws of nineteen hundred seventy-five, is hereby amended to read as follows:

2. The public defender shall also represent, without charge, in a proceeding in family court or surrogate's court in the county or counties where such public defender serves, any person entitled to counsel pursuant to section two hundred sixty-two and section eleven hundred twenty of the family court act and section four hundred seven of the surrogate's court procedure act, who is financially unable to obtain counsel. When representing such person, the public defender shall counsel and represent him at

every stage of the proceedings, shall initiate such proceedings as in the judgment of the public defender are necessary to protect the rights of such person, and may prosecute any appeal when, in his judgment the facts and circumstances warrant such appeal.

§43. Section seven hundred eighteen of such law, as amended by chapter six hundred eighty-two of the laws of nineteen hundred seventy-five, is hereby amended to read as follows:

§718. Appointment of other counsel. Nothing contained herein shall preclude a court on its own motion or upon application by the public defender or by the indigent defendant or person described in section two hundred sixty-two[,] or section eleven hundred twenty of the family court act, or section four hundred seven of the surrogate's court procedure act, from appointing an attorney other than the public defender to represent such defendant or person or to assist in the representation of such defendant or person at any stage of the proceedings or on appeal. If such attorney is appointed, he shall serve without compensation, unless such compensation is otherwise provided for by law.

§44. The article heading of article eighteen-B of such law, as amended by chapter six hundred eighty-two of the laws of nineteen hundred seventy-five, is hereby amended to read as follows:

REPRESENTATION OF PERSONS ACCUSED OF CRIME OR PARTIES BEFORE
THE FAMILY COURT OR SURROGATE'S COURT

§45. Section seven hundred twenty-two of such law, as last amended by chapter seven hundred eighty-two of the laws of nineteen hundred seventy-five, is hereby amended to read as follows:

§722. Plan for representation. The governing body of each county and the governing body of the city in which a county is wholly contained shall place in operation throughout the county by December first, nineteen hundred sixty-five a plan for providing counsel to persons charged with a crime or who are entitled to counsel pursuant to section two hundred sixty-two or section eleven hundred twenty of the family court act or section four hundred seven of the surrogate's court procedure act, who are financially unable to obtain counsel. Each plan shall also provide for investigative, expert and other services necessary for an adequate defense. The plan shall conform to one of the following:

1. Representation by a public defender appointed pursuant to county law article eighteen-A.

2. In criminal proceedings, representation by counsel furnished by a private legal aid bureau or society designated by the county or city, organized and operating to give legal assistance and representation to persons charged with a crime within the city or county who are financially unable to obtain counsel. In proceedings under the family court act, representation by a private legal aid bureau or society, or by any corporation, voluntary association, or organization permitted to practice law under the authority of subdivision five of section four hundred ninety-five of the judiciary law.

3. Representation by counsel furnished pursuant to a plan of a bar association in each county or the city in which a county is wholly contained whereby the services of private counsel are rotated and coordinated by an administrator, and such administrator may be compensated for such service. Any plan of a bar

association must receive the approval of the state administrator before the plan is placed in operation. In the county of Hamilton, such representation may be by counsel furnished by the Fulton county bar association pursuant to a plan of the Fulton county bar association.

4. Representation according to a plan containing a combination of any of the foregoing. Any judge, justice or magistrate in assigning counsel pursuant to section 170.10, 180.10, 210.15 and 720.30 of the criminal procedure law, or in assigning counsel to a defendant when a hearing has been ordered in a proceeding upon a motion, pursuant to article four hundred forty of the criminal procedure law, to vacate a judgment or to set aside a sentence, or in assigning counsel pursuant to the provisions of section two hundred sixty-two of the family court act or section four hundred seven of the surrogate's court procedure act, shall assign counsel furnished in accordance with a plan conforming to the requirements of this section; provided, however, that when the county or the city in which a county is wholly contained has not placed in operation a plan conforming to that prescribed in subdivisions three or four of this section and the judge, justice or magistrate is satisfied that a conflict of interest prevents the assignment of counsel pursuant to the plan in operation, or when the county or the city in which a county is wholly contained has not placed in operation any plan conforming to that prescribed in this section, the judge, justice or magistrate may assign any attorney in such county or city and, in such event, such attorney shall receive compensation and reimbursement from such county or city which shall be at the same

rate as is prescribed in section seven hundred twenty-two-b of this chapter.

Upon an appeal in a criminal action, and on any appeal described in section eleven hundred twenty of the family court act or section four hundred seven of the surrogate's court procedure act, wherein the party is financially unable to obtain counsel, the appellate court shall assign counsel furnished in accordance with the plan, conforming to the requirements of this section, which is in operation in the county or in the city in which a county is wholly contained wherein the judgment of conviction, disposition, or order of the trial court was entered; provided, however, that when such county or city has not placed in operation a plan conforming to that prescribed in subdivisions three or four of this section and such appellate court is satisfied that a conflict of interest prevents the assignment of counsel pursuant to the plan in operation, or when such county or city has not placed in operation any plan conforming to that prescribed in this section, such appellate court may assign any attorney in such county or city and, in such event, such attorney shall receive compensation and reimbursement from such county or city which shall be at the same rate as is prescribed in section seven hundred twenty-two-b of this chapter.

§46. Section seven hundred twenty-two-b of such law, as last amended by chapter six hundred eighty-two of the laws of nineteen hundred seventy-five, is hereby amended to read as follows:

§722-b. Compensation and reimbursement for representation. All counsel assigned in accordance with a plan of a bar association conforming to the requirements of section seven hundred twenty-two whereby the services of private counsel are rotated and coordinated by an administrator shall at the conclusion of the representation receive compensation at a rate not exceeding fifteen dollars per hour for time expended in court or before a magistrate, judge or justice, and ten dollars per hour for time reasonably expended out of court, and shall receive reimbursement for expenses reasonably incurred. Where a defendant is charged with a crime which may be punishable by death compensation shall not exceed one thousand five hundred dollars where one counsel has been assigned, and shall not exceed two thousand dollars where two or more counsel have been assigned. Where a defendant is charged with one or more other felonies, compensation shall not exceed five hundred dollars. Where a defendant is charged with one or more other crimes, compensation shall not exceed three hundred dollars. For representation pursuant to the provisions of section two hundred sixty-two of the family court act or section four hundred seven of the surrogate's court procedure act, compensation shall not exceed three hundred dollars. For representation upon the hearing of a motion for a writ of error coram nobis or a motion to vacate judgment or set aside sentence made pursuant to article four hundred forty of the criminal procedure law, compensation shall not exceed three hundred dollars. For representation in the court of appeals on an appeal from a judgment of death, compensation shall not exceed one thousand five hundred dollars where one counsel has been assigned, and shall not exceed two thousand dollars where two or more counsel have been assigned. For representation in an appellate court on an appeal from a judgment of conviction for one or more other felonies, compensation shall not exceed five hundred dollars. For representation in an appellate court on an appeal in any other criminal action or proceeding, or on any appeal described in section eleven hundred twenty of the family court act or section four hundred seven of the surrogate's court procedure act, compensation shall not exceed three hundred dollars.

For representation on an appeal, compensation and reimbursement shall be fixed by the appellate court. For all other representation, compensation and reimbursement shall be fixed by the court where judgment of conviction or acquittal or order of dismissal was entered. In extraordinary circumstances the court may provide for compensation in excess of the foregoing limits and for payment of compensation and reimbursement for expenses before the completion of the representation.

Each claim for compensation and reimbursement shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source.

No counsel assigned hereunder shall seek or accept any fee for representing the party for whom he is assigned without approval of the court as herein provided.

§47. Section seven hundred twenty-two-c of such law, as amended by chapter six hundred eighty-two of the laws of nineteen hundred seventy-five, is hereby amended to read as follows:

§722-c. Services other than counsel. Upon a finding in an ex parte proceeding that investigative, expert or other services are necessary and that the defendant or other person described in section two hundred forty-nine or section two hundred sixty-two of the family court act or section four hundred seven of the surrogate's court procedure act, is financially unable to obtain them, the court shall authorize counsel, whether or not assigned in accordance with a plan, to obtain the services on behalf of the defendant or such other person. The court upon a finding that timely procurement of necessary services could not await prior authorization may authorize the services nunc pro tunc. The court shall determine reasonable compensation for the services and direct payment to the person who rendered them or to the person entitled to reimbursement. Only in extraordinary circumstances may the court provide for compensation in excess of three hundred dollars.

Each claim for compensation shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source.

§48. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law; provided, however, that nothing herein contained shall be construed so as to alter, affect, impair, defeat or restore any rights, obligations, duties or interests accrued, incurred, conferred or terminated prior to the effective date of this act.

NOTE: Subdivisions six and seven of section three hundred eighty-four of the Social Services Law, proposed to be repealed by this Act, relate to proceedings to terminate parental rights. They would be replaced by the more extensive provisions of Section 384-b, proposed to be added to the Social Services Law by this Act.

NOTE: Sections six hundred twelve, six hundred thirteen and six hundred fifteen of the Family Court Act, proposed to be repealed by this Act, provide for a definition of "permanently neglected child", for venue and for appropriate petitioners in permanent neglect proceedings. They would be replaced by provisions of Section 384-b, proposed to be added to the Social Services Law by this Act.

APPENDIX II-1

Statistical Data

Seven public agencies and 33 New York City voluntary agencies are included in he survey of agency activities in freeing and finding adoptive homes for children in foster care.* They were asked how many termination petitions were initiated and how many voluntary surrenders obtained in 1973; of the court petitions, how many resulted in the freeing of the child by May 1975; and of the children freed either by voluntary surrender or court disposition, how many had been adopted by May 1975. Questions in the survey also covered the Foster Care Review: for all foster care reviews in 1973, what recommendation the agency had made, what the court ordered and whether the agency had complied with the court order by May, 1975. For purposes of comparison, all the children in the agency's custody and living in foster homes and agency boarding homes during 1973 are used as a base population.

The data are presented in the following tables with a brief commentary on the salient points, with particular attention to the relative use and efficacy of different procedures and to the differences between public and voluntary agencies.

Table 1 shows in summary form what happened to the cohort of children who were in foster homes and agency boarding homes during 1973 and for whom the agencies surveyed took action during that year to terminate parental rights. Such action was taken in 2,112 cases, equal to 8.5 percent of all children in foster homes and agency boarding homes at the end of 1973. This figure includes court proceedings initiated and voluntary surrenders actually obtained (no figures were available on unsuccessful agency efforts to obtain voluntary surrenders during the year). Of this group, 1,906 had been freed for adoption by May 1975; 206 of the court cases had still not been determined. A total of 1,062 had been adopted by May 1975, equivalent to 4.3 percent of the base foster care population.

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*Eight New York City voluntary agencies which responded to other parts of the survey, had no termination proceedings in 1973 and one agency was not able to supply necessary data.

The next group of tables is concerned only with the initial action undertaken in 1973 for freeing the child. Table 2 shows that for all agencies combined, the voluntary surrender accounts for slightly more than half the cases in question, abandonment for one third and permanent neglect for the rest, except for a few court proceedings of other kinds. This table also indicates how much agencies differ in their reliance on the various routes by which parental rights may be terminated. In the six public agencies outside New York City, three-quarters were voluntary surrenders; this is significantly different from the situation in New York City where the proportion was 43 percent for both New York City Special Services for Children (S.S.C.) and the voluntary agencies. Among types of court procedures, the New York City voluntary agencies initiated abandonment better than three times more frequently than permanent neglect, while the upstate public agencies combined used the two court procedures to an almost equal extent (also significant). However, there was great variability among the public agencies in this respect. As shown by Table 2a, in Westchester, Suffolk, and Onondaga Counties abandonment was not used at all; but in Erie County, 74 percent of court proceedings initiated were abandonments (roughly the same pattern as in the New York City voluntary agencies).

Tables 3 and 4 present data on just the court proceedings initiated in 1973, expressed as a percentage of all the children in foster homes and agency boarding homes at the end of 1973. Voluntary agencies (Table 3) started proceedings for 5.4 percent of their children. Though low, this rate is more than twice as high as the 2.4 percent for the public agencies. The rates for each of the seven public agencies is listed in Table 4. There is no significant difference between the rate for New York City S.S.C. and that for the other six public agencies when aggregated. Tables 5 and 6 deal with voluntary surrenders in similar fashion: the difference between voluntary and public agencies is significant, but too small to be meaningful, with the public agencies obtaining surrenders for a slightly higher proportion of their children (4.8 percent for public agencies compared with 4.2 percent for New York City voluntary agencies). However, Table 6 shows, the public agencies also vary greatly in this respect; and New York City S.S.C.'s rate of 2.1 percent is only a third of the 6.4 percent rate of the other public agencies combined.

Voluntary agencies, therefore, were initiating court procedures to a greater degree than the public agencies but were obtaining voluntary surrenders to a lesser extent than the public agencies outside New York City. If the two types of procedures are combined (Table 7) it can be seen that the voluntary agencies had taken action to terminate parental rights for 9.6 percent of their children in foster care; the public agencies outside New York City for 8.6 percent and New York City S.S.C. for 4.9 percent. The S.S.C. rate is significantly lower than the other two groups of agencies and in fact (Table 8) it ranks almost lowest of all seven public agencies. The difference between the voluntary and remaining public agencies aggregated, though statistically significant is too slight to be meaningful. It should be borne in mind that because attempts to obtain voluntary surrenders, if unsuccessful in 1973, are not included here, these rates do not reveal the full extent of agency efforts to free children.

The next group of tables deals with children who were in fact legally freed for adoption. The voluntary surrenders obtained during 1973 are here treated not as an action initiated but as children freed for adoption, even though in a handful of cases the surrender may subsequently be revoked. The Court procedures refer to children freed by the Court by May 1975 on the basis of petitions initiated in 1973. Table 9 indicates that in the combined group, 57.3 percent were voluntary surrenders: more children were freed by voluntary surrenders obtained in 1973 than by Court action between 1973 and the May 1975 cut off date for this project. This leaves more than 43 percent freed by Court order, including 30 percent by abandonment and 11 percent by permanent neglect - a difference that largely reflects the number of petitions initiated in 1973. There were significant differences between types of agencies in the proportion of their children freed for adoption under different termination proceedings, but these also largely correspond to differences in procedures begun in 1973 (Table 2). Table 10 shows that 813 cases (80 percent of the court procedures begun) had resulted in successful freeing of the child by court order. Of the remaining 206 cases, 19 were dismissed or received suspended judgement, 39 ended in voluntary surrender, and 148 had not been disposed of by the court.

Procedures to free were more successful in the cases of abandonments (83%) than permanent neglect (72%) (a difference significant at the .001 level).

As Table 11 indicates, the overall success rate in freeing children by court proceedings was higher for the New York City voluntary agencies (82%) than for the public (75%).

The fourth group of tables analyzes adoptions. Table 12 reveals that among children in this cohort, adopted by May 1975, 75% were freed for adoption because of voluntary surrenders, and 25% through court order. Once again, the differences between upstate public and New York City voluntary agencies emerge clearly: 91% of the children adopted through the efforts of the public agencies had been voluntarily surrendered; of those adopted through the voluntary agencies 65% had been surrendered and the remainder were adopted as a result of court order.

When the rate of adoption is examined, i.e. the number adopted in this time period compared with the total number freed for adoption, Table 13 shows that nearly three-quarters of the children surrendered but only some one-third of the children freed by the courts, under either permanent neglect or abandonment proceedings, had been adopted. One reason for this difference, certainly, is simply that in the group of children under study, the voluntary surrenders were all obtained in 1973 and the children were free for adoption over a longer period than the others, who could have been freed at any time up to May 1975. Overall, 56% of all the children freed had been adopted.

Table 14 shows the adoption rate for different types of agencies; the rate for New York City S.S.C. is considerably lower than that for the other two groups; and the public agencies outside New York City have a higher rate than the voluntary agencies in the City. The latter difference, however, is misleading, because the upstate public agencies had a much higher proportion of voluntary surrender cases than the City voluntary agencies. As shown in Table 13, the aodption rate was much higher for surrendered children than for the court-freed, which accounts for a higher over all adoption rate among these other six public agencies. In fact, for any given court procedure for terminating parental rights, the adoption rate was almost as high or higher among the City voluntary agencies (see Table 12). Table 15 gives adoption rates for each public agency, and shows once again the great differences between counties.

Foster Care Review was examined from the point of view of the agency's recommendation, the court's order and agency compliance. The Tables presented here cover all 1973 foster care reviews in the agencies studied except New York City and Erie where a random sample was drawn, analyzed and incorporated into the tables. All children reviewed had been in care two years or longer at the time of the review.

Table 16 on Agency Recommendations shows that "continue foster care" was the most frequent agency recommendation with 58% in this category overall. The frequency of the recommendation to continue foster care ranged from 53% for all New York City voluntary agencies to 95% for the Onondaga County Department of Social Services. The other three recommendations ("free", "place", "discharge") were fairly evenly distributed in terms of frequency (17%, 12% and 12% respectively). Among the districts in the survey, the frequency range in agency recommendation to "free for adoption" is from 0%

(Chemung, Westchester and Onondaga) to 20% (New York City public and voluntary).

Table 17 on Court Orders illustrates a pattern similar to the agency recommendations. Sixty-one percent of the orders were"to continue foster care," as compared with 58% of the agency recommendations. In New York City courts, the majority of these orders required a series of follow-up reports, but based on the staff study, no definitive orders resulted when these reports were submitted. On an overall basis, the Court ordered 2% more "proceedings to free" than the agencies recommended, though in Erie County the Court ordered this twice as often as the agency recommended. In Chemung, Westchester and Onondaga, the Court approved the agency recommendations in every case, of which 89% to 95% were "to continue foster care". Table 18, a comparison of Court orders in New York City and in the six counties surveyed outside the City, demonstrates significantly that the New York City courts were ordering "free for adoption" more frequently than courts in the other six counties (22% compared to 6%) and ordering "continue foster care" less frequently (57% in the City versus 82% in the upstate districts). The New York City figures aggregate foster care reviews for both the public and the voluntary agencies.

Table 19 illustrates the proportion of foster care review cases where the agency complied with the Court's order. Compliance was total in the three public agencies where the Court agreed with all agency recommendations, but considerably less in other counties or in the New York City voluntary agencies. The mean compliance with orders to continue foster care was 93%, but the mean compliances with orders to institute proceedings to free or to place for adoption were each 71 percent.

Table 20 shows by agencies surveyed the number of children freed for adoption but not placed in adoptive homes as well as those children placed in adoptive homes but not legally adopted as of May 1975.

Tables 21 and 22 describe use of the State's Adoption Subsidy Program among the agencies surveyed. Use of the Subsidy Program was greatest among New York City voluntary agencies; among public agencies, Monroe County used adoption subsidy most frequently.

TABLE I

OUTCOME BY MAY 1975 OF PROCEDURES INITIATED IN 1973 TO TERMINATE PARENTAL RIGHTS FOR CHILDREN IN FOSTER CARE*

	Voluntary Surrender[1]		Court Action		Total	
	No.	% of Children In Foster Care	No.	% of Children In Foster Care	No.	% of Children In Foster Care
Action Undertaken, 1973	1093	4.4%	1019	4.1%	2112	8.5%
Children Freed[2]	1093	4.4%	813	3.3%	1906	7.7%
Children Adopted By May 1975	799	3.2%	263	1.1%	1062	4.3%

[1] It is not known in how many cases efforts to obtain voluntary surrenders were initiated; the 1093 were actually obtained in 1973, excluding 3 surrenders later revoked by Court order.

[2] During 1973 through voluntary surrender and by May 1975 through Court order.

*As of 12/31/73 these were 24,687 children in foster homes and agency boarding homes in the districts surveyed. This definition will apply to the remaining tables in this Appendix when such tables refer to total Population in Foster Care.

TABLE 2

TYPE OF ACTION UNDERTAKEN IN 1973 TO TERMINATE PARENTAL RIGHTS, BY TYPE OF AGENCY

Type of Agency	Voluntary Surrenders Obtained		Court Proceedings Initiated						Total	
			Permanent Neglect		Abandonment		Other			
	No.	%	No.	%	No.	%	No.	% %	No.	%
Public Agencies Outside N.Y.C.	423	74.5%	75	13.2%	70	12.3%	0	0.0%	568	100%
N.Y.C. Public	87	43.3%	49	24.4%	65	32.3%	0	0.0%	201	100%
N.Y.C. Voluntary	583	43.4%	172	12.8%	558	41.5%	30	2.2%	1,343	100%
TOTAL	1,093	51.7%	296	14.0%	693	32,8%	30	1.4%	2,112	100%

$X^2 = 215.7$, df = 6, $P < .001$

TABLE 2a

ABANDONMENT AND PERMANENT NEGLECT PETITIONS INITIATED IN SEVEN PUBLIC AGENCIES

Social Services District	Abandonment No.	Abandonment %	Permanent Neglect No.	Permanent Neglect %	Total No.	Total %
Erie	53	74%	19	26%	72	100%
Chemung	2	50%	2	50%	4	100%
Westchester	0	0%	7	100%	7	100%
Suffolk	0	0%	29	100%	29	100%
Onondaga	0	0%	3	100%	3	100%
Monroe	15	50%	15	50%	30	100%
New York City	65	57%	49	43%	114	100%
Total	135	52%	124	48%	259	100%

TABLE 3

COURT PROCEEDINGS INITIATED IN 1973 BY TYPE OF AGENCY AS PERCENT OF TOTAL POPULATION IN FOSTER CARE

Type of Agency	Court Proceedings Initiated in 1973	Percentage of Total Population In Foster Care	Total Population In Foster Care
Public (All surveyed, upstate & NYC)	259	2.4%	10,687
N.Y.C. Voluntary	760	5.4%	14,000
TOTAL	1019	4.1%	24,687

$X^2 = 137.5$, df = 1, $P < .001$

TABLE 4

COURT PROCEEDINGS INITIATED (1973) BY SEVEN PUBLIC AGENCIES AS PERCENT OF TOTAL POPULATION IN FOSTER CARE

Social Services District	Court Proceedings Initiated in 1973	Percentage of Total Population In Foster Care	Total Population In Foster Care
Erie	72	4.2%	1,718
Chemung	4	3.0%	133
Westchester	7	0.4%	1,744
Suffolk	29	2.3%	1,278
Onondaga	3	0.4%	779
Monroe	30	3.2%	939
New York City	114	2.8%	4,096
TOTAL	259	2.4%	10,687

TABLE 5

VOLUNTARY SURRENDERS OBTAINED IN 1973 BY TYPE OF AGENCY AS PERCENTAGE OF TOTAL POPULATION IN FOSTER CARE AT THE END OF 1973

Type of Agency	Voluntary Surrenders 1973	Percentage of Total Population In Foster Care	Total Population In Foster Care
Public (All surveyed, upstate & NYC.)	510	4.8%	10,687
N.Y.C. Voluntary	583	4.2%	14,000
TOTAL	1093	4.4%	24,687

$X^2 = 5.15$, df = 1, $P < .05$

TABLE V

VOLUNTARY SURRENDERS OBTAINED IN 1973 BY 7 PUBLIC AGENCIES, AS PERCENTAGE OF TOTAL POPULATION IN FOSTER CARE

Social Services District	Voluntary Surrenders 1973	Percentage of Total Population In Foster Care	Total Population In Foster Care
Erie	66	3.8%	1,718
Chemung	10	7.5%	133
Westchester	50	2.9%	1,744
Suffolk	100	7.8%	1,278
Onondaga	60	7.7%	779
Monroe	137	14.6%	939
New York City	87	2.1%	4,096
TOTAL	510	4.8%	10,687

TABLE 7

ALL PROCEDURES INITIATED IN 1973, VOLUNTARY SURRENDER AND COURT TERMINATIONS, BY TYPE OF AGENCY, AS PERCENT OF TOTAL POPULATION IN FOSTER CARE

Type of Agency	All Procedures Initiated in 1973	Percentage of Total Population In Foster Care	Total Population In Foster Care
Public Agencies Outside N.Y.C.	568	8.6%	6,591
N.Y.C. Public	201	4.9%	4,096
N.Y.C. Voluntary	1,343	9.6%	14,000
TOTAL	2,112	8.6%	24,687

$X^2 = 88.92$, df = 2, $P < .001$

TABLE 8

ALL PROCEDURES INITIATED IN 1973, VOLUNTARY SURRENDERS AND COURT TERMINATIONS, FOR 7 PUBLIC AGENCIES, AS PERCENT OF TOTAL POPULATION IN FOSTER CARE

Social Services District	All Procedures Initiated in 1973	Percentage of Total Population In Foster Care	Total Population In Foster Care
Erie	138	8.0%	1,718
Chemung	14	10.5%	133
Westchester	57	3.3%	1,744
Suffolk	129	10.1%	1,278
Onondaga	63	8.1%	779
Monroe	167	17.8%	939
New York City	201	4.9%	4,096
TOTAL	769	7.2%	10,687

TABLE 9

CHILDREN FREED FOR ADOPTION BY MAY 1975, THROUGH 1973 VOLUNTARY SURRENDER OR COURT PROCEDURE BEGUN, BY TYPE OF AGENCY

Type of Agency	Voluntary Surrender		Permanent Neglect		Abandonment		Other		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%
Public Agencies Outside N.Y.C.	423	77.3%	62	11.3%	62	11.3%	0	0.0%	547	100%
N.Y.C. Public	87	55.8%	27	17.3%	42	26.9%	0	0.0%	156	100%
N.Y.C. Voluntary	583	48.5%	124	10.3%	472	39.2%	24	2.0%	1,203	100%
TOTAL	1,093	57.3%	213	11.2%	576	30.2%	24	1.3%	1,906	100%

$X^2 = 173.9$ df = 6, $P < .001$

TABLE 10

SUCCESS OF COURT PROCEEDINGS TO FREE CHILDREN, BY TYPE OF PROCEEDING

	Permanent Neglect		Abandonment		Other		Total	
	No.	%	No.	%	No.	%	No.	%
Freed by May 1975	213	72%	576	83%	24	80%	813	80%
Not Freed	83	28%	117	17%	6	20%	206	20%
TOTAL	296	100%	693	100%	30	100%	1,019	100%

$X^2 = 16.01$, df = 2, $P < .001$

TABLE 11

SUCCESS OF COURT PROCEEDINGS TO FREE CHILDREN, BY TYPE OF AGENCY

Type of Agency	Freed By May 1975		Not Freed		Total Court Proceedings 1973	
	No.	%	No.	%	No.	%
Public (All surveyed, upstate & NYC.)	193	75%	66	25%	259	100%
N.Y.C. Voluntary	620	82%	140	18%	760	100%
TOTAL	813	80%	206	20%	1,019	100%

$X^2 = 5.97$, df = 1, $P < .05$

TABLE 12

ADOPTIONS BY MAY 1975, BY TYPE OF AGENCY AND TYPE OF PROCEDURE TO FREE

Type of Agency	Voluntary Surrender		Permanent Neglect		Abandonment		Other		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%
Public Agencies Outside N.Y.C.	335	91%	24	6%	11	3%	0	0%	370	100%
N.Y.C. Public	42	91%	1	2%	3	7%	0	0%	46	100%
N.Y.C. Voluntary	422	65%	43	7%	175	27%	6	1%	646	100%
TOTAL	799	75%	68	6%	189	18%	6	1%	1,062	100%

$X^2 = 107.1$, df = 6, $P < .001$

TABLE 13

SUCCESS OF ADOPTION EFFORTS FOR CHILDREN FREED, BY TYPE OF PROCEDURE TO FREE

	Voluntary Surrender		Permanent Neglect		Abandonment		Other		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%
Adopted By May 1975	799	73%	68	32%	189	33%	6	25%	1,062	56%
Not Adopted	294	27%	145	68%	387	67%	18	75%	844	44%
TOTAL	1,093	100%	213	100%	576	100%	24	100%	1,906	100%

$X^2 = 314.4$, df = 3, $P < .001$

TABLE 14

SUCCESS OF ADOPTION EFFORTS BY TYPE OF AGENCY

Type of Agency	Adopted By May 1975		Not Adopted		Total	
	No.	%	No.	%	No.	%
Public Agencies Outside N.Y.C.	370	68%	172	32%	547	100%
N.Y.C. Public	46	29%	110	71%	156	100%
N.Y.C. Voluntary	646	54%	557	46%	1,203	100%
TOTAL	1,062	56%	844	44%	1,906	100%

$X^2 = 77.0$, df = 2, $P < .001$

TABLE 15

SUCCESS OF ADOPTION EFFORTS OF PUBLIC AGENCIES

Social Services District	Adopted By May 1975		Not Adopted		Total	
	No.	%	No.	%	No.	%
Erie	45	35%	83	65%	128	100%
Chemung	14	100%	0	0%	14	100%
Westchester	39	68%	18	32%	57	100%
Suffolk	76	63%	45	37%	121	100%
Onondaga	59	94%	4	6%	63	100%
Monroe	137	84%	27	16%	164	100%
New York City	46	29%	110	71%	156	100%
TOTAL	416	59%	287	41%	703	100%

TABLE 16

1973 FOSTER CARE REVIEW
AGENCY RECOMMENDATIONS BY TYPE OF AGENCY

Type of Agency	Explore to Free or Institute Proceedings To Free		Place For Adoption		Explore For Discharge or Discharge To Parents		Continue Foster Care		Other*		Total
	No.	%	No.	%	No.	%	No.	%	No.	%	
Erie	5	6%	10	13%	11	14%	46	58%	7	9%	79
Chemung	0	0%	1	11%	0	0%	8	89%	-	-	9
Westchester	0	0%	2	0.5%	34	9%	340	90%	-	-	376
Suffolk	33	16%	7	3%	6	3%	165	78%	-	-	211
Onondaga	0	0%	0	0%	4	5%	70	95%	-	-	74
Monroe	13	9%	24	17%	24	17%	83	58%	-	-	144
N.Y.C. Public	31	20%	8	5%	18	12%	96	62%	1	0.6%	154
N.Y.C. Voluntary	796	20%	566	14%	496	12%	2,142	53%	31	0.8%	4,031
TOTAL RECOMMENDATIONS	878	17%	618	12%	593	12%	2,950	58%	39	0.8%	5,078 100%

*Majority of "other" category are recommendation for institutionalization, 1 recommendation for the Job Corps, 1 absconded PINS.

TABLE 17

1973 FOSTER CARE REVIEW: COURT ORDERS BY TYPE OF AGENCY

Type of Agency	Institute Proceedings To Free		Place For Adoption		Discharge To Parents		Continue Foster Care		Other		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%		
Erie	10	13%	11	14%	12	15%	39	49%	7	9%	79	
Chemung	0	0%	1	11%	0	0%	8	89%	-	-	9	
Westchester	0	0%	2	0.5%	34	9%	340	90%	-	-	376	
Suffolk	26	12%	15	7%	9	4%	161	76%	-	-	221	
Onondaga	0	0%	0	0%	4	5%	70	95%	-	-	74	
Monroe	15	10%	14	10%	3	2%	112	78%	-	-	144	
N.Y.C. Public	40	26%	7	4%	15	10%	92	60%	-	-	154	
N.Y.C. Voluntary	841	21%	502	13%	325	8%	2,229	57%	34	0.9%	3,931*	
TOTAL ORDERS	932	19%	552	11%	402	8%	3,051	61%	41	0.8%	4,978*	100%

*Difference in total court orders and total recommendations (Table 16) in N.Y.C. Voluntary agencies attributed to adjournments resulting in no final disposition in 1973.

TABLE 18

1973 FOSTER CARE REVIEW: COURT ORDERS FOR N.Y.C. AND OTHER COUNTIES

	Initiate To Free		Place For Adoption		Discharge To Parent		Continue Foster Care		Other		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%		
Six Counties	51	6%	43	5%	62	7%	730	82%	7	0%	893	
N.Y.C. Public and Voluntary	881	22%	509	12%	340	8%	2,321	57%	34	1%	4,085	
TOTAL	932	19%	552	11%	402	8%	3,051	61%	41	0%	4,978	100%

$X^2 = 215.86$, $df = 4$, $P < .001$

TABLE 19

1973 FOSTER CARE REVIEW: AGENCY COMPLIANCE WITH COURT ORDERS AS PERCENTAGE OF ALL COURT ORDERS

Type of Agency	Institute Proceedings To Free %	Place For Adoption %	Discharge To Parents %	Continue Foster Care %	Other %
Erie	40%	36%	67%	97%	100%
Chemung	-	100%	-	100%	-
Westchester	-	100%	100%	100%	-
Suffolk	46%	47%	89%	83%	-
Onondaga	-	-	100%	100%	-
Monroe	100%	100%	33%	82%	-
N.Y.C. Public	93%	43%	67%	88%	-
N.Y.C. Voluntary	77%	70%	84%	95%	100%
MEAN*	71.2%	71.9%	77.1%	93.1%	100%

*Percentages are the means of the percentages for this group of agencies, including N.Y.C. Voluntary agencies combined, not the percentage of total cases when agencies complied,

TABLE 20

CHILDREN FREED FOR ADOPTION, BUT NOT PLACED IN ADOPTIVE HOMES, AND PLACED IN ADOPTIVE HOMES BUT NOT LEGALLY ADOPTED, BY AGENCY, AS OF MAY 1975

Agency	Free Not Placed	Placed, Not Legally Adopted
Erie	345	67
Suffolk	93	97
Chemung	9	12
Onondaga	30	33
Monroe	41	87
Westchester	325	55
New York City Public	141	437 (86 awaiting subsidy)
Angel Guardian Home	33	84 (52 awaiting subsidy)
Brookwood Child Care	2	30 (18 awaiting subsidy)
Catholic Home Bureau	75 (51 home studies underway)	145
Cardinal Hayes Home	0	1
Cardinal McCloskey	30	37
Childrens Aid Society	44	60
Abbott House	1	0
Catholic Guardian	3	66
Edwin Gould	9	79
Greer	1	0
Graham Home	3	1
JCCA	6	56
Lakeside School	1	0
Leake & Watts	21	45

TABLE 20 CON'T.

Agency	Free Not Placed	Placed, Not Legally Adopted
Little Flower	6	44
Lutheran	4	30
McMahon Memorial	0	2
N.Y. Catholic Guardian	44	21
N.Y. Foundling	96	241
Salvation Army	20	15
St. Christopher	4	15
St. Dominic's Home	9	21
St. Josephs of Peekskill	18	7
St. Michael's Home	0	1
Speedwell Services	17	52
Sheltering Arms	12	27
Spence Chapin	370	338
Talbot Perkins	19	21
Windham Child Care	62	55
St. Mary of Angels	8	0
St. Cabrini Home, Inc.	1	1
Astor Home for Children	0	2
Brooklyn Bureau of Community Services	3	21
Childrens' Village	5	0
Brooklyn Home	5	23
TOTALS	1,916	2,329

TABLE 21

SUBSIDIZED ADOPTIONS BY TYPE OF AGENCY

Type of Agency	Subsidized		Not Subsidized		Total Adoptions In 1973 Cohort	
	No.	%	No.	%	No.	%
Public Agencies Outside N.Y.C.	73	20%	297	80%	370	100%
N.Y.C. Public	4	9%	42	91%	46	100%
N.Y.C. Voluntary	352	54%	294	46%	646	100%
TOTAL	429	40%	633	60%	1,062	100%

$X^2 = 138.1$, df = 2, P .001

TABLE 22

SUBSIDIZED ADOPTION FOR 7 PUBLIC AGENCIES

Social Services District	Subsidized		Not Subsidized		Total Adoptions In 1973 Cohort	
	No.	%	No.	%	No.	%
Erie	7	16%	38	84%	45	100%
Chemung	1	7%	13	93%	14	100%
Westchester	8	20%	31	80%	39	100%
Suffolk	1	1%	75	99%	76	100%
Onondaga	0	0%	59	100%	59	100%
Monroe	56	41%	81	59%	137	100%
New York City	4	9%	42	91%	46	100%
TOTAL	77	19%	339	81%	416	100%

APPENDIX III

Children in Foster Care: The Impact of Review by the Family Court

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Children in Foster Care: The Impact of Review by the Family Court*

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Section 392 of the Social Services Law was enacted in 1971 to provide judicial review of children who had been in foster care continuously for 24 months. It was a response to mounting criticism of the increasing number of children in foster care, the rising costs to the state for support of children in foster care, and of the long periods in which they remained in such care. Children in foster care were described as being harmed rather then helped when held in "the limbo of foster care," instead of being returned to their biological families or placed in adoption homes.

The New York Law provides that the Family Court shall review all cases of children in voluntary placement for 24 months and determine whether they shall be discharged to their biological families, continued in foster care, be freed for adoptive placement, or placed in an adoptive home. The Law is not applicable when agencies have discharged children from foster care, or placed children in adoptive homes within 24 months after they are initially placed in foster care. The intent of the law is to provide monitoring and judicial review for only those children who continue in foster care for more than the 24 months. In 1975 this period was reduced to 18 months.

* This study was supported by The Temporary State Commission on Child Welfare through a grant from the New York State Department of Social Services. It was carried out with the cooperation of the New York State Family Court and the Office of Allocation and Accountability of the New York City Bureau of Child Welfare. The author thanks the directors and staff of both for their help. The The author also thanks Barbara Emmerth, research associate, for extremely valuable assistance throughout the study.

Before the enactment of Section 392, it was strongly opposed as a measure that introduced court intervention in determining what was in the best interest of children in the care or custody of social agencies who regarded this as their province. The argument slowly shifted from opposition to monitoring what agencies decided, to proposals that monitoring should be accomplished by internal review, with involvement of courts only as a matter of last resort. There have also been proposals that review of children in foster care, and determination of what was in their best interest, should be handled by some form of administrative review, rather than by judicial review.

Even among those who have supported the 392 review procedure there have been criticisms of its administration. Questions have also been raised as to how effective it has been, and in what ways it could be made to function more effectively. This study was planned to seek answers to these two questions.

Earlier Study of 392 Court Review

The effect of court review of children in foster care was studied by the author in 1974 (3). At that time it was possible to compare the actions of agencies to free children for adoption in cases that were reviewed by the court as compared to cases that were not reviewed. The data in the 1974 study showed that the 392 court review spurred agencies to take steps needed to free children for adoption. It was also found that the court review appeared to act as a catalyst in getting agencies to examine children in care more carefully, develop plans for them, and take steps to implement such plans. The 1974 study found that periodic review expedited the movement of children out of the foster care system.

The Present Study

Following the publication of the 1974 study, it seemed valuable to develop a study which would provide further data on what happened to children as a result of reviews under Section 392 proceedings. The present study is focused on the cases of 235 children who had been placed voluntarily in foster care for the first time in 1970 and had been reviewed by the Family Court.

Among the reasons for the present study were unanswered questions raised by the previous study in regard to both the administration of the law by the public agency and court on the one hand, and compliance by the voluntary agencies with the law and court decisions on the other hand. The need for answers to the following questions were raised by the 1974 study:

1. If agencies were taking more steps to free children for adoption, in what number or percentage of cases was adoption effected?
2. When the court, on review, ordered continuing foster care, but directed the agencies to submit follow-up reports, did agencies submit such reports?
3. When discharge or adoptive placement were ordered by the court, did such children actually leave foster care in accordance with the court orders?
4. How many and what percentage of the children reviewed by the court remained in foster care three years after the initial review?

Procedures of Study

The 235 cases* selected for this follow-up study had all been included in the 1974 study. As noted above, all of these children had entered foster care for the first time in 1970. All had been placed voluntarily by a parent or guardian, had remained in care continuously for at least two years, and were in a foster boarding or group home supervised by one of 28 voluntary agencies at the time the agency petitioned the Family Court for review. The cases of all of the 235 children had been reviewed by the court by December 31, 1973. In 98** of these cases, the court had ordered a continuation of foster care and had required a follow-up report from the agencies. Of the remaining cases, the court had ordered 31 children to be discharged, 69 children to be legally freed for adoption, and 37 children to be placed for adoption.

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*The 1974 study reported on 248 reviewed children. Twelve of these were excluded in the current study as these were cases in which the court had continued foster care without requesting a follow-up report. An additional case was excluded when it was learned that this child was in long term placement in a psychiatric hospital, and that a follow-up by the court had been requested primarily to ascertain information about a hospital transfer. This case was therefore similar to the other twelve that had been excluded from the study.

**In this study, the distribution of dispositions varies slightly from their distribution in the 1974 study. This was due to the exclusion of a case (see above), and several errors involving the transmission and classification of dispositions. For example, an order to free a child had been signed on a child who was already free, and an order to place a child for adoption had been misclassified as "explore adoption". Such cases were reclassified in the present study. None of these changes affected any of the findings of the 1974 study.

The Family Court's Section 392 petition files were reviewed on all 235 cases in order to collect all the information on hearings, adjournments, and reports submitted by the agencies. In addition, case and card files of the Office of Allocation and Accountability of the New York City Division of Special Services for Children (DSS) were examined and cross-checked to secure all information available on what steps agencies had taken to free children for adoption, to learn to what extent adoption steps had been taken, and to find out where each of the 235 children were living on June 1, 1975 when the data gathering for this study was terminated.

The author and a research associate were responsible for all data collection following a training period during which seven cases were independently coded by the two researchers. Instances of disagreement were few, and these occurred when there was some ambiguity in the information. Since the two researchers had worked together on the 1974 study, and were familiar both with the data and potential coding problems, further reliability checks were limited to instances of ambiguity in the information. All collection of data terminated in June 1975.

In addition to the collection and coding of these data on the children, the researchers collected information on who attended the hearings, and on the number of hearings and adjournments in each case.

Court Review Procedures

Prior to a court review, all known parties are named and the court seeks to notify all parties who have an interest.

A. Attendance at Hearings

The extent to which natural parents, foster parents, caseworkers of the agencies involved, and attorneys representing the agencies appeared at the Family Court 392 hearing varied greatly. All hearings were attended by counsel for the New York City Division of Special Services of the Department of Social Services.

The petition files included data on appearances in 216 of the 235 cases. These data are summarized in Table 1.

Caseworkers of the agencies and/or their supervisors appeared at a large majority (88.9%) of the hearings. The caseworker appeared alone at only 31 hearings. Agency lawyers appeared at 50.9% of the hearings. Both caseworkers and agency lawyers appeared at 86 (40.4%) of the hearings.

Foster parents appeared at 42% of the hearings. At least one member of the biological family or the child's guardian appeared at 39%* of the hearings. Foster parents and/or a member of the biological family or the child's guardian appeared at 139 (64.4%) of the hearings. As a rule, foster parents and members of the biological family did not appear at the same hearing.

In no case was a judge's contact with a child recorded in the court files. Perhaps such contact occurred more often than it was possible to detect from a review of these files. In any event, such personal contact was a rare occurrence, although

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*This percentage is artificially low as the base total (216) includes a number of free and surrendered children, and therefore parental appearance was not relevant.

TABLE 1

Attendance* at the 392 Court Review

	Present		Not Present		Total
	N	(%)	N	(%)	N
Agency Caseworker and/or Supervisor	192	(88.9)	24	(11.1)	216
Agency Lawyer	110	(50.9)	106	(49.1)	216
Foster Parent(s)	90	(41.7)	126	(58.8)	216
Biological Family or Guardian	85	(39.4)	131	(60.6)	216

*All hearings are attended by a lawyer representing the New York City Division of Special Services for Children.

in some cases the court appointed a law guardian to represent the child. Presumably this was done in those situations where the court saw a reason for an independent assessment of the child's situation.

In a breakdown of the appearances by religion, we found that foster parents who worked with Protestant or with non-sectarian agencies were more likely to appear than foster parents who worked with Catholic agencies. In contrast, we found that the appearance of a biological parent or guardian occurred more frequently in the cases of children under the supervision of Catholic agencies. We have no knowledge of whether these differences are due to agency philosophy, practice, or the characteristics of the families that were involved.

Regardless of the reasons or explanations given for non-appearance, there was no appearance by the biological family at 60.6% of the hearings, and there was no appearance of the foster parents at 58.3% of the hearings. While there may be a substantial number of biological parents who have moved or disappeared so that they receive no notice, this is not true of the foster parents whose address is always known.

Whether it is necessary or advisable for foster parents to appear at 392 proceedings depends on the circumstances of a case including the plans of the agency for the child, the position of the biological parents toward return of the child to them, and the interest of the foster parents in providing continuing care or adoption for the child. When the agency plans to discharge a child to the natural family, there may be little reason for foster parents to appear unless they wish to submit evidence in opposition to such discharge. When the agency seeks continued foster care with the foster parents, or adoption, there is little reason for appearance by the foster parents unless they seek to adopt the child. However, if the parents are seeking custody or the agency has rejected the foster parents as adoptive parents, foster parents, who have had a child for 24 months should be present and are entitled to be present with counsel so that they may be heard on the issue of custody.

It is noteworthy that lawyers for voluntary agencies appeared at approximately one half of the review hearings in regard to children in foster care. It cannot be assumed that lawyers were used on a selective basis to be present when difficult problems were involved, since some agencies were almost always represented by counsel, while some were never represented. In a breakdown of cases by the religion of the agencies, we found that agencies under Catholic auspices were far more likely to be represented by counsel at review hearings than agencies under Protestant, Non-sectarian, or Jewish auspices. Sixty-eight percent of the cases under Catholic auspices were represented by lawyers as compared to 27% of the cases under other auspices. The same differences continued when a case appeared for a second hearing.

Such a wide discrepancy in the use of counsel and the reasons for it require further study, and require consideration of whether criteria should be developed to govern when agencies should use legal representation and whether this should continue to be optional with each agency deciding for itself. Whether the use of counsel depends on the availability of counsel for the agency, is the result of considered judgment by the agency, or results from fiscal policies needs exploration. At the present time, no guidelines in regard to the use of counsel have been developed by either the agencies collectively or the public agencies responsible for children in foster care.

We examined the outcome of review proceedings in relationship to who appeared at the hearings. The main finding was that when a member of the biological family was present, the court was more likely to order discharge to the family or continue the child in foster care with a request for a follow-up report, and was less likely to order that the child be freed for adoption. Orders for discharge and continued foster care were equally likely in such cases. This finding is consistent with the finding in our 1974 study (3:223) that where family interest was high, discharge dispositions were more likely.

B. The Number of Hearings and Adjournments

By December 31, 1973, the 235 cases in the study had been reviewed. Seventy of these cases were heard a second time and 14 of them had three or four hearings by June 1975. These data are summarized in Table 2. Of the 70 cases with two or more hearings, over half had been continued in foster care, with a follow-up report required, at the time of the first 392 hearing.

TABLE 2

Initial 392 Court Disposition and Number of Hearings

	One Hearing		Two+ Hearings		Total
First 392 Disposition	N	(%)	N	(%)	N
Continue Foster Care and Follow-Up	60	(61.2)	38	(38.8)	98
Discharge	25	(80.6)	6	(19.4)	31
Legally Free	51	(73.9)	18	(26.1)	69
Place For Adoption	29	(78.4)	8	(21.6)	37
Total	165		70		235

That this category of disposition had the highest proportion of multiple hearings was not surprising. At the same time, one must still ask why a majority of the cases in this category, most of whom had been in foster care for five years, had only been heard once, and why some cases were selected for a second hearing rather than others.

A discussion of multiple hearings would not be complete without a description of some general characteristics of these proceedings. For example, a total of 51 cases scheduled for a hearing were adjourned at least once. Thirty-two of these were in cases with more than one hearing. Adjournments were granted when someone (usually a lawyer) failed to appear, or because of a request for legal representation by the biological family, or when the court decided a lawyer should be appointed to represent the child. Additional adjournments were given because a family member had not been sent proper notice or because an agency requested additional time to complete its reports. All such cases were classified as adjournments.

There was, however, some inconsistency among judges in what they called an adjournment, particularly where foster care was continued for the time being and a further report, such as a psychological on a parent, was requested. For example, one judge might adjourn following considerable courtroom testimony, while another called it a continuation in foster care while requesting a follow-up. There were even cases labeled adjournment at times that a judge ordered an agency to free a child. In addition to such matters of definition, adjournments were apt to pose a problem for those involved. Since 32 of the 70 cases with multiple hearings included at least one adjournment, and some had as many as four, they were apt to include many instances in which all parties but one appeared, resulting in wasted time.

At the first 392 hearing, 179 cases had been reviewed by Family Court judges and 56 by Civil Court judges assigned to the Family Court. Of the 70 cases with two or more hearings only 9 (12.9%) were heard by the same judge at the later hearing. Whether greater continuity would have resulted in more effective court action remains a question. This could not be examined in our study because of the pervasive lack of continuity.

Despite the lack of continuity of judicial personnel, there seems to have been considerable consistency in the positions taken by the judges at the initial and subsequent hearings, where multiple hearings occurred.

In 48 of 66 cases where the direction of the court in subsequent hearings was discernable, the judges moved in the same direction as the judges who had heard the case initially. In 14 of the remaining 18 cases the change of direction of the judges at subsequent hearings moved toward adoption or discharge. In 4 cases the judge at the subsequent hearing moved from an initial adoption or a discharge direction to continuation of foster care, at least for the time being.

When initial and subsequent dispositions were examined jointly, orders for discharge, for freeing for adoption or adoptive placement had been entered in the cases of 153 (65%) of the 235 children by June 1975. Orders to continue the child in foster care, without a follow-up report requested, had been entered on two (1%) children. By June 1975 there had still been no final dispositional orders in 80 (34%) of the 235 cases studied, although there was a discernible leaning by the court toward discharge or toward adoption in most of these cases.

Court Procedures to Secure Compliance

Although only 70 cases of the 235 reviewed by December 31, 1973 had more than one hearing by June 1975, considerable material was available from reports agencies were required to submit following the first 392 hearing. In all but one of the 235 cases, such reports were ordered at the first hearing. The time allowed by the court for submission of such reports varied from about three months to one year. The average period allowed was 6.1 months. Although the mean time allowed varied somewhat among the various court dispositions, they did not differ significantly. However, judges varied within dispositional categories. It is not possible to ascertain whether such variations were responsive to situations that seemed to require shorter or longer periods for solutions, or whether they reflected idiosyncratic tendencies of the judges. The greatest variations occurred in the time set for reports following orders to discharge, and following orders continuing a child in foster care.

It is of interest that the average time allowed for reports following an order to free a child for adoption did not differ from the average time allowed following other dispositions and that there were smaller variations among judges in the time allowed for such reports. These findings suggest that where the court made orders to free a child, they sought to secure compliance without undue delay.

There is reason to question why such variations in time requirements were allowed by the court and whether shorter periods would not result in more effective action.

Compliance by the Agencies

Compliance by agencies consists of two components which must be identified and examined. The first component involves adherence by the agency to rendering reports to the court within the time allowed. The second component involves the content of the report and the extent to which such content provides the court with the information required by the court.

A. Time Factor in Agency Compliance

Of 234 reports ordered by the court, only 144 (61.5%) were submitted on time; 55 (23.5%) were late, but of these 24 (10%) were less than one month late; 35 (15%) had still not been received by June 1975 when the data collection for this study ended.

The court sometimes rescheduled cases with overdue reports for a further hearing. This occurred in 15 of the 35 cases where no report was received and in 12 of the 55 cases where the reports came in late, or in a total of 27 (30%) of the 90 cases where reports had not been received on time.

The failure of the court to require reports on time, and the failure of the agencies to submit them on time, thus result both in waste of court time and possible postponement of action on cases. These findings indicate a poor track record on the part of the agencies in fulfilling their responsibility and on the part of the court in failing to monitor and secure compliance with its orders. A brief example is illustrative:

> A was placed in foster care at age 6. Three years later, at the time of the court review, the judge continued the child in foster care and ordered the agency to submit a report in eight months recommending a permanent plan after exploring the possibility of the child's returning to her family and exploring the possibility of freeing the child for adoption. The judge also specifically directed that another hearing be scheduled when the report was received. No report was received by the court in the 17 months that followed that first hearing and no other hearing was scheduled during that time.

The timeliness in rendering reports ordered by the court was examined in relation to other variables such as race, religion, sex of children, the religious auspices and the size of agencies, and in relation to the dispositions by the court. The one significant difference found was a mean difference among different court dispositions.[1]

The reports were on the average least late when the court ordered continued foster care.[2] The average tardiness was greater when the court ordered that the child be freed for adoption,[3] still greater when the court ordered placement for adoption,[4] and greatest when the court ordered discharge.[5] These differences in tardiness may reflect attitudes that the reports were less important if children were to be discharged or placed for adoption than if they remained in care; they might reflect delays in completing steps ordered by the court, or resistance to the order of disposition.

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1. F=2.87, d.f. 3/230, p=.036
2. mean=1.27 months
3. mean=2.13 months
4. mean=3.14 months
5. mean=3.90 months

In any event, the failure to comply with court requirements for reports presented unnecessary administrative problems for the court, and suggested less than sufficient respect for the court's authority and responsibility.

Since the delays in reporting were greatest in regard to children for whom adoptive placement or discharge was intended by the court, and most of these children were adoptively placed or discharged by June 1975, it might be argued that the delay in reporting did not affect the ultimate fate of these children. However, this does not answer the question of whether earlier reporting by the agenc~~y~~ies, if properly screened, would not have led to earlier final dispositional orders directing the ending of foster care. The absence of a sense of urgency in reporting to the court is reflected even more by the fact that agencies tended to use the maximum time allowed by the court for making reports following a review hearing. Rarely did a report arrive much earlier even among the 61% that arrived on time. If the court ordered that adoption be explored and required a report in five months, or 10 months, the report was submitted then. It is likely that the scheduled activity on cases was often geared to the time set by the court. In this sense, variations among individual judges in the time given agencies to submit reports appeared to be important.

B. Substantive Compliance

The question of substantive compliance is concerned with the extent to which the content of reports ordered by the court is responsive to what the court directed be done. Reports were rated as high, moderate or not in compliance. All but the obvious cases were independently rated by the author and a research associate. For example, if an agency was directed to explore the possibility of discharge to the biological family and evaluate the child's readiness for discharge, and the agency reported contact and discussion with the family about discharge together with some assessment of the child, the report was rated as high in compliance.

If the report noted only exploration with the family and no evaluation of the child, the report was rated as moderate in compliance.

If the report included neither exploration with the family nor assessment of the child, and no change in circumstances was reported, the report was rated as not in compliance.

The ratings were based on the activity reported by each agency without attempting to evaluate the quality of the work done. They therefore were on the generous side. After all, a report that mentioned "working with the mother on discharge" or "exploring plans" could mean many things. Unfortunately, the lack of specificity in many of the reports forced a relatively benign view of compliance. This was particularly true of reports submitted in response to some relatively vague orders that accompanied the continuation of foster care.

Of the 235 cases studied, substantive compliance was rated in 187 cases. The remaining 48 could not be rated either because (in 35 cases) no reports had been received, or because (in 13 cases) the court follow-up order was not in the file, or because there had been such a change of circumstances as to justify non-compliance.

Of the 187 cases rated, with the liberal interpretation described, 142 cases (75.9%) were rated high in compliance. 32 cases (17.1%) were rated as showing little or no compliance. 13 cases (6.9%) lay in between.

It seems important that most of the cases rated as showing little or no compliance occurred when the court had issued orders to initiate proceedings to free a child. Of the 58 cases in which such orders had been issued 28 (41.4%) were rated as showing little or no compliance. The actions of the agencies in these cases were extremely limited. For example:

> D was nine months old when she was abandoned and came into placement. There was no further contact with her mother or other family. When D was four years old, the agency's goal was continued foster care. The agency stated that adoption was not appropriate because D lagged developmentally. At the 392 hearing, the court ordered the agency to initiate proceedings to free the child and asked for a progress report in six months. This was received on time and stated nothing other than "we are planning to free this child."

In a number of cases the issue of a diligent search appeared to be used inappropriately. When there were grounds for abandonment, an agency could have instituted such proceedings without a diligent search. Also, if the whereabouts of the parent was known, promise of a plan for a diligent search was irrelevant and appeared to be made to appease the court rather than to achieve the freeing of the child through a procedure to terminate parental rights. Nevertheless, whether or not appropriate, the simple use or promise of a diligent search without even requesting permission to initiate proceedings to terminate rights, was rated as low compliance. The following examples are illustrative of such low compliance:

> J's mother said she wanted him to be adopted when J was placed in foster care shortly after birth. She had no further contact with J and her whereabouts soon were unknown. At the 392 hearing about three years following placement, the agency stated that their goal was adoption. The judge ordered the agency to initiate proceedings to free the child and requested a progress report in six months. Nine months after that hearing, the court received a report that the agency was in the process of doing a diligent search. The agency had not instituted an abandonment proceeding.
>
> L was placed at the age of one month because her mother was emotionally disturbed. Although the mother expressed some interest in L, this quickly dwindled and after three months there were no contacts, nor were other family members interested. At the 392 hearing the mother's whereabouts were not known. The judge ordered the agency to initiate proceedings to free the child and to submit a report in six months. Eight months following that hearing, the court received a letter from the agency asking for information about the disposition at that hearing. One month later a report noted that "a diligent search will be done". As in the first case above, abandonment proceedings had not been instituted.

Questions arise as to whether the failure to comply represents a tug-of-war or a delaying tactic on the part of the agencies when they are not in accord with court decisions that children shall be moved out of foster care and placed in adoptive homes.

C. Corrective Court Action to Meet Agency Non-Compliance

In 1974 the Family Court instituted a system whereby agencies are notified when reports are overdue and are informed that the case will be recalendared if no report is received by a given date. At the same time, the court set up a procedure to screen agency reports for compliance with what the court had ordered. At the time the data were collected for this study, the procedure for recording receipt of the reports appeared to be working smoothly, but the review of the reports to assure compliance on content had been assigned to only one person in the Office of Probation. This is too heavy a burden for one person, given the importance of such evaluation.

The necessity for careful screening and monitoring is reflected in the following case, where the agency failed to do what the court had directed until after the second hearing and specific additional court instruction. As a result there were two successive 6-month delays in initiating the adoption process.

> S was placed in foster care from a hospital when he was four months old because his mother was not able to care for him. The mother, a suspected drug user, showed no interest in S, never visited him, nor did any other member of the family. There was no casework contact with the mother. At the 392 hearing, when S was three years old, the judge ordered the agency to initiate proceedings to free the child and required a report in six months. The agency report at that time stated that in the interim, the mother had been visited several times but that she refused to surrender the child. The agency added, incomprehensibly, that they planned to make a diligent search. The court, after reviewing this report and on finding it non-compliant, recalendared the case. At the second hearing a number of months later, the court again ordered the agency to initiate freeing procedures, and suggested that the agency thoroughly discuss subsidized adoption with the foster parents. A further report was required in six months. At that time, the agency reported that the child had been freed. Three months later the foster parents were in the process of adopting S.

Case reading as well as statistical findings on delays in full compliance with court orders to free a child or place a child for adoption established that the court must accept more responsibility for monitoring compliance in 392 cases, and that the agencies must show more accountability for compliance with court orders.

Review of such variables as the timing of reports, race, religion, sex or the age of the child at the time of placement showed no statistical relationship to substantive compliance. Neither did the size or religious auspices of the agency. The most significant factor affecting both timing and substantive compliance was the disposition by the court. While slightly over three-quarters of the reports were rated as high in compliance (75.9%) by the liberal interpretation described above, nearly one quarter of the reports fell below the level of such compliance. Less than full or satisfactory compliance in approximately one fourth of the cases underscores the need for an effective tracking or monitoring system that will be concerned with substantive compliance, raise questions promptly when there are failures to fulfill the court directions, and bring such cases to the court's attention for corrective action when necessary, to assure full compliance with 392 court orders.

Surrender and the Freeing of Children for Adoption

Children can be freed for adoption by court action or by the acceptance of surrender from the biological parents. Therefore to give a broad perspective of agency activity to move children to adoptive homes we reviewed the amount of surrender, freeing, and movement toward these ends.

Table 3 summarizes the data on the extent to which agencies had taken steps toward obtaining surrender or toward legally freeing the children by June 1974 and June 1975. We also examined what progress had been made between June 1974 and June 1975. Seventy eight cases were excluded as these were cases that had been discharged or the agency goal was discharge or its exploration, and therefore a move toward surrender or freeing would not have made sense.

Our findings showed substantial increases in securing surrenders and in court freeing of children between June 1974 and June 1975. For example, the number of children for whom surrenders had been secured in this one year period moved from 44 in June 1974 to 58 in June 1975; in addition there was one child who had been surrendered but who was also freed for adoption from a second parent, and three other children who had been previously surrendered and were now in the process of being freed from the second parent during the 1974-1975 period. Conversely, three children who had been freed by June 1974 through legal action against one parent had been surrendered by the second parent by June 1975.

Our findings also showed a substantial increase in the number of children freed for adoption through the courts between June 1974 and June, 1975. The number had more than doubled from 18 to 40. In addition, there were two cases where steps had been taken to free children from a second parent after being freed so far as one parent was concerned.

TABLE 3

Surrender and Freeing: Total Steps from 1970 to June 1975*

Actions by June 1974	Additional Actions Between June 1974 and June 1975
Surrendered	
44 children (28%)	1 Was freed from a second parent 3 Steps taken to free from a second parent
Freed	
18 children (11.5%)	3 Were surrendered by second parent 1 Steps taken to free from a second parent
Steps Taken	
74 children (47.1%)	12 Were surrendered 24 Were freed 31 Further steps taken
No Actions	
21 children (13.4%)	3 Were surrendered 1 Was freed 9 Steps taken

Total Steps from 1970 to June 1975

	Surrendered	Freed	Steps Taken	No Actions	Total
Total	58	40	51**	8	157
(%)	(36.9)	(25.5)	(32.5)	(5.1)	(100.0)

* The placement of children in adoptive homes is presented in Table 4.
** 4 of these children had been surrendered or freed from 1 parent by June 1974.

Since almost one half of the cases that were included in the category of "steps taken" leading to adoption in 1974 had been either surrendered or freed by June 1975, the number of cases in our sample where agencies were still taking such steps had decreased between 1974 and 1975. Hopefully, they were taking such steps on behalf of other children, those placed in foster care since 1970, and were helped to do so by what had been achieved on behalf of the children placed in 1970.

It was encouraging to find that of the 157 children in Table 3, there were only eight cases in which no action had been taken by June 1975. Any reaction to this result must be tempered by the fact that there were also 11 cases in which no steps had been taken beyond instituting a diligent search, and that in seven cases some steps had been reported in 1974, with no additional action in the following year.

To summarize what had been accomplished and what steps had been taken on behalf of the 157 children where discharge to the biological family was not considered a goal: 62.4% had been surrendered or freed by June 1975; in 32.5% of the cases some steps had been taken to secure surrenders or free children for adoption, although the efforts or steps were meagre in some cases. However, in 5% of the cases nothing had been done.

In the first study we were able to compare cases that had been reviewed with cases not reviewed by December 31, 1973. It was shown that agencies were more likely to have moved toward obtaining surrender or legally freeing the children, if the court had reviewed the case. In the present study, such a comparison was not possible as our sample consisted entirely of cases that had been reviewed. The high volume of agency activity does suggest that the court review continued to have such an impact. We can examine the court's impact by looking at the extent to which children had moved out of foster care.

Where Children Were in June 1975

A. Children in Adoptive Homes

All of the 235 children studied had been placed in foster care in 1970 and had been in such care for at least two years, so that when they were removed it occurred during the three following years. Of the 235 children, 80 (34.1%) were in adoptive homes. Three quarters of the adoptive homes were receiving or had been approved for subsidy. Fifty (21.3%) had been discharged to their biological families.[*] 105 of the children (44.7%) were still in foster care. These data are presented in Table 4.

B. Children Discharged to the Biological Family

Of the 235 children, 50 (21.3%) had been discharged to their biological homes. In addition, there were 18 among the 105 children continued in foster care where the agency goal was eventual discharge. For 6 of these 18 children, the court had ordered discharge and that goal seemed to be closer.

C. Children Continued in Foster Care

105 of the children (44.7%) were still in foster care. Further analysis of these 105 children showed that 37 were headed toward adoption and that for 18 the goal in June 1975 was still

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[*] A few in this group were still classified as on trial discharge.

TABLE 4

The Location of Children by June 1975

Foster Home		
Clear Discharge Goal	18	
Foster Parents Likely to Adopt	26	
Others Likely to Adopt	11	
Others	50	
Total		105 (44.7%)
Discharged and Trial		50 (21.3%)
Adoptive Home		
Subsidy Approved*	33	
Subsidized Adoptive Home	28	
Non-subsidized Home	19	
Total		80 (34.1%)
		235

*Some of these cases were, strictly speaking, not approved but very close to approval.

discharge. Of the 37 headed for adoption, 26 were living with foster parents who wished to adopt them with the approval of the agency (six of these children had been freed by June 1975), and eleven children were living with foster parents who did not wish to adopt them or were not regarded as suitable adoptive prospects by the agencies. The 37 headed for adoption and the 18 headed for discharge thus totaled 55 of the 105 children still in foster care.

The remaining 50 children of the 105 in foster care consisted of 21 cases where the agency goal was unclear but included possibilities of discharge or adoption, 14 where there was no mention of any plan other than continued foster care, 12 where no report had been submitted and 3 in which adoption was referred to as "a long-term goal." In nine of the 50 cases the children had been freed by June 1975. The court's disposition of these 50 cases at the time of the first 392 hearing was as follows: 39 cases had been continued in foster care with a report required from the agencies; 9 cases were ordered freed; 2 were ordered discharged. Second or third hearings had been held in 22 of the 50 cases, and in about half of these later hearings, the court requested further reports from the agencies on what was being done.

D. Summary of Whereabouts of and Goals for 235 Children Studied

By June 1975, of the 235 children first placed in foster care in 1970 and reviewed by the court under 392 proceedings, 117 children (49.8%) had been placed in adoptive homes or were headed for such homes in the near future. 68 children (28.9%) had been discharged or were headed for discharge, 6 in the near and 12 in the more remote future. Plans for the remaining 50 children (21.3%) continued in foster care were less clear, and for 14 of these the reports contained no plan for any alternative to continuing foster care.

Factors Related to Where Children Were in June 1975

A. Examination of Variables

An examination of variables that might be related to where the children were in June 1975 included sex, religion and race. None were found to be a factor, with one exception within the group placed for adoption or ordered to be freed for adoption. A significantly higher proportion of the White children had been adopted, while more Black and Puerto Rican children were headed for, but still awaiting, adoption. Whether such delays for non-white children were due to delays in finding adoptive homes, securing subsidy, or to other causes is not apparent from the record. The reasons for the delays require further study.

B. Age at Time of Initial Placement a Factor

We also tried to determine whether the reasons given for the initial placement were factors in where the children were in June 1975. We found that where parents had been unwilling to assume care when the children were infants and the initial placement occurred when they were infants, they were more likely to be among those adopted or headed for adoption. Age at the time of initial placement was a factor in the whereabouts of the children five years later. The average age at initial placement of children discharged was 2.2 years. The average age at initial placement of children continued in foster care (excluding those headed for adoption) was 2.9 years. In contrast, the average age at initial placement of children in the adoption group was .8 years.

C. Siblings - A Factor

Children in the adoptive group, on the average, had fewer siblings in placement than those discharged or continued in foster care. Whether concern for keeping a family unit together or the failure to find or seek adoptive families for siblings were responsible is not evident from the reports available.

D. Interest of Biological Parents or Family as a Factor

As in the 1974 study, four variables directly related to the mothers affected the status of the children in June 1975. These consisted of: (1) the caseworker's assessment of the mother's adjustment during the first two to three years of foster care; (2) the mother's expression of interest in the child; (3) the family's contacts during the first two to three years of foster care; and (4) casework services rendered to the mother by the agency in whose care the child had been placed.

(1) If the assessments of the mother by the caseworker were negative during the EARLY years of foster care, 51% of the children were in the adoptive group and the rest were about equally divided between foster care and discharge by June, 1975. However, if the assessments of the mother were positive, only 22% of the children were in the adoptive group, 39% had been discharged, and 39% were still in foster care.

(2 & 3) When the mother's expressed interest during the first two to three years of foster care was low, 69% of the children were in the adoptive group, 9% were discharged and 22% remained in foster care. In contrast, where such interest was high or moderate, only 26% were in adoptive care, 37% had been discharged and 37% remained in foster care. The families' contact with the children was similarly related.

(4) Where casework services were rendered to the biological mother on a regular or even intermittent basis during the early years of foster care, discharge was a more likely outcome than either continued foster care or adoption. Whether such service was provided inevitably depended on the mother's accessibility and interest as well as on the attitude of the agency to the mother and the quality of its services.

While the data on casework assessments of the mother, of expressed family interest, of family contacts, and the provision of casework services to the mother were based on data collected during the first two to three years in foster care, these four factors continued to be significantly related to the status of the children several years later, in June 1975.

E. Age of Child and Family Contact as Interacting Factors

This investigator, as well as others, have reported on the importance of family contact as a predictor of whether children will continue in foster care. This study showed that the age of a child at the time of initial placement in 1970 and the subsequent family contacts* were significant factors in the status of the child in June 1975.

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* Family contacts refer to all contacts by mother, father and/or other family members during the first two to three years spent by a child in foster care as reported by the agency caseworkers.

Table 5 shows that of the 235 children in this study, 157 (66.8%) were under one year of age at the time of initial placement in 1970. For these children, family contact was strongly related to the whereabouts of the child in June 1975. Where there was little family contact 78% were adopted or on the road to adoption. Where family contact had been moderate or high, 31% were adopted or on the road to adoption. For those children who had moderate or high family contact, the outcome was more likely to be discharge to the family than either adoption or continuing foster care.

The outcomes were far less promising for the 76 children in this study who ranged in age from over one year to their early teens when they were first placed in foster care in 1970. For those of the 76 children who had little family contact, only 37% were in the adoptive group as compared to 78% of the younger group. When family contact had been moderate or high, only 15% were in the adoptive group as compared to 31% of the younger group. For even the older children who had high or moderate family contact, a majority (53.7%) continued to remain in foster care, while a lower percentage (37.1%) of those with little contact remained in foster care. 25.7% of the 76 children in the older group were discharged where there was no or low family contact as compared to 4.8% of the 157 children who had been initially placed when they were under one year of age and who had low or no family contact.

Family contact for the older children was thus found to play a far less substantial role than for the younger children.

TABLE 5

Age at Placement, Family Contact and Location in June 1975

Location June 1975	Young Age				Older Age *			
	No or Low Contact		Moderate or High Contact		No or Low Contact		Moderate or High Contact	
Foster Care	18	(17.1)	14	(26.9)	13	(37.1)	22	(53.7)
Discharge	5	(4.8)	22	(42.3)	9	(25.7)	13	(31.7)
Adoption Group	82	(78.1)	16	(30.8)	13	(37.1)	6	(14.6)
Total	105		52		35		41	

Chi Square = 42.62, 2 d.f., $p < .001$

Chi Square = 5.18, 2 d.f., $p > .05$

*For 2 older children there was no information on family contact.

Almost an equal proportion of older children with high or low contacts were discharged back to their families.

These findings raise serious questions about the prospective outcome of foster care for children initially placed when their ages range from over one year to their early teens. With far less hope for adoptive placement for older children, a fair proportion were discharged to families with whom they had little or no contact. It is of course possible that in the one or one and a half years between the collection of our data on family contact and the time of discharge, some families may have reestablished regular contact with the children. Our impression is that this rarely, if ever, occurred as these were all cases with no or minimal contact with the children in all the preceding years in foster care.

This study did not explore the extent to which the older children who had spent years in foster care without family contact or plans for adoptive placement became restless and disturbed. However, the number of discharges to families with whom the older children had little or no contact raises the question of the extent to which these children were discharged as they became difficult to manage for foster parents and agencies, although their prospects with the biological families may have been very dim.

Once again, the data make clear that action to discharge or free for adoption through agency planning, effective court monitoring and court review should be handled with a sense of urgency from the time a child is first placed in foster care, and that this is especially true for children who are first placed when they are no longer infants.

The reasons for the greater difficulties in placing older children in adoptive homes, when return to their biological home is not indicated, appear related not only to the age of the children, but to slower movement on the part of the agencies to secure adoptive homes for older children. It also seemed that at the 392 hearings, the court showed a greater sense of urgency to free younger children, probably viewed as more adoptable. The agencies, in turn, may have felt more pressure to make greater efforts to free younger children for adoption as they faced review proceedings.

Thus traditional concepts of both the agencies and the court about adoption being primarily for younger children, together with assumptions about the importance of family ties for older children, and the realistic difficulties in securing adoptive homes for children resulted in the discharge to families and continuing foster care for a far higher proportion of the older children with little family contact. Of the 35 older children identified as having little or no family contact, nine (25.7%) were discharged to their families as compared to five of 105 (4.8%) of the younger children having little or no family contact. Of the same 35 older children in this group, thirteen (37.1%) were continued in foster care as compared to eighteen (17.1%) of the younger children with little or no family contact.

These figures indicate the need both for reexamination of traditional concepts and assumptions, and for more intensive efforts to secure permanent homes for children who initially come into foster care when they are no longer infants.

F. Relationship of Initial 392 Court Disposition to Outcome for Children

This study found a strong relationship between the initial 392 court disposition and the whereabouts of, or outcome for, the children by June 1975:

1. Where the court had ordered discharge at the initial review proceeding, 77.4% of the children had been discharged by June 1975. However, 22.6% of these children had not been discharged in compliance with the court review order.
2. Where the court had ordered that children be freed or placed for adoption at the initial review proceeding, 90.6% were in the adoptive group by June 1975.
3. Where the court continued the children in foster care with directions for follow-up reports at later dates 54% remained in foster care, close to 26% had been discharged, and 20% were in the adoptive group by June 1975. Reports on well over one third of the 54% in foster care included references to discharge and adoption goals.

In regard to those children continued in foster care with direction for further reports, the agencies showed far less clarity as to their goals for the children than in the cases where the court ordered discharge or action that moved a child toward adoption at the initial 392 review.

While the relationship of court orders at the initial review to the outcome cannot isolate and define the exact weight to be accorded the court review process in determining the outcome, it is important that 167, or 71%, of the 235 children reviewed in 392 proceedings had left or were close to leaving foster care by June 1975. Tracing the time course of the movement of these children can shed some light on the question.

The 1974 study showed that during the two year period from 1972 to 1974, less than one half (46%) of the 235 children placed in foster care in 1970 had left foster care. 126, or 54%, were still in care after four years. During the following 12 month period 63, or 50% of the children remaining in foster care in June 1974 had left foster care or were scheduled to leave. Such movement out of foster care following two to four years in foster care is noteworthy since it has not been reported in earlier studies (1:80, 2:Table 9, 4:323, 5:421, 6:51). In fact, earlier studies tended to suggest that unless children left care in the first two to three years of placement, they had little chance of leaving foster care.

The important question raised by the continuing movement of children out of foster care in the study cases is what caused it. Without comparison with a group not subject to 392 review it is difficult to reach a firm conclusion of the impact of the court review on this increased movement out of foster care. The legislative action establishing subsidies in 1969, the increased availability of subsidy, more generous allowances in special cases, and increased use of subsidies by agencies, after a slow start, surely contributed to the results. However, it is important to recognize that in the 392 proceedings the courts found it necessary to press agencies to use the subsidies, especially where availability of such subsidies had not been discussed with foster parents.

While undoubtedly helpful, the availability of subsidies could not alone account for the continuing increase in the number of children who were moving out of foster care. Discussion by agencies of subsidies with foster parents usually did not occur until children were freed for adoption, and it was the court that had the strongest impact on freeing children for adoption (3:238). The existence of subsidies also cannot explain why a slightly higher proportion of children moved out of foster care in the one year period, 1974 to 1975, than in the two year period from 1972 to 1974. In fact, the movement out of foster care FROM 1974 to 1975 is more impressive since the children had been in foster care longer, and previous studies, as noted earlier, show that such movement is unusual. It would, therefore, seem warranted to conclude that the court was having a cumulative effect on what happened to children in foster care through the orders it issued, through multiple hearings, and through the growing awareness of the agencies that further hearings would be held if the court was not satisfied with their efforts to move children out of foster care when possible. The institution of monitoring agency reports in 1974 to assure compliance with court orders, both as to the time of submission and the content, strengthened the value of 392 and placed emphasis on the duty of compliance with court orders. The role of the court through 392 hearings had thus become a spur and a procedure for enforcing the legislative intent that the court should act to require permanent homes for foster care children through discharge or adoptive placement wherever possible.

Summary and Discussion

This study examined what had happened to 235 children placed in foster care in 1970, who had been in foster care two to five years, and whose cases had been reviewed for the first time by the Family Court in 392 proceedings by December 31, 1973. It examined what had been accomplished for these children by June 1975, the actions of the agencies with whom these children had been placed, and the role of the court in 392 proceedings. The study includes analysis of factors which were found to affect the discharge of children to their biological families, their being freed for or placed in adoptive homes, or their being continued in foster care.

The Outcome for the 235 Children by June 1975:

80 children (34.1%) were in adoptive homes, three quarters of whom were receiving subsidies.

50 children (21.3%) had been discharged to their biological families.

105 children (44.7%) were still in foster care. However, of this group 37 children were close to adoption, and 18 children were headed for discharge to their biological families.

These outcomes were the result of both court dispositional orders and steps taken by the agencies independent of the court orders. Of the 157 in this study for whom return to the biological family was not a definite goal, 62.4% had either been surrendered to the agencies for adoption or been freed by court order for adoption by June 1975. The agencies had also taken some steps toward adoption for an additional 32.5% in this group, though some of the steps were meagre or inadequate. In eight cases no such actions had been taken.

Outcome in this Study and in Earlier Studies

Earlier studies when no 392 proceedings were operative showed that the longer children remained in foster care, the likelihood of both discharge to families and of adoption decreased. In this study we found that this was not so:

- 109 of the 235 children (46%) left foster care during the two year period of 1972-1974.
- During the following one year period, June 1974 to June 1975, 63 (50%) of the children remaining in foster care had left or were scheduled to leave foster care.
- Surrender for adoption increased between 1974 to 1975 from 44 to 58.
- The number of children freed for adoption during the year 1974 and 1975 increased from 18 to 40 so that the total had more than doubled.

The increase and marked acceleration in securing surrenders and freeing children for adoption in these cases that had been reviewed under Section 392 is impressive and especially noteworthy for children who had first come into placement in 1970, and had been in foster care for two to five years.

Significant Variables in Outcomes for Children

Age and Family Contact

The age of the children at the time of initial placement was an important factor in their prospect for adoption. For children initially placed when under one year of age, prospects for adoption were greatest. When family contacts were low, 78% of these children were found in the adoptive group. In contrast, for children ranging in age from one year to the early teens at placement, even when family contacts were low, only 37% were found in the adoptive group. In fact, a fair proportion were ultimately discharged to biological families with whom they had little contact since their placement in 1970.

If the children were infants when initially placed and family contacts were maintained, they were likely to be discharged to their biological families. For the older group, this was not so likely, and a large proportion continued in foster care.

It would therefore seem that screening, monitoring and court action must be regarded as a necessity for children who first come into foster care when they are no longer infants. The sense of urgency to secure permanent homes for them should first engage the agencies who receive them, and secondly, the court in 392 review actions when the agency has not already acted effectively.

Race of the Children

A higher proportion of White children had been adopted than of children who were Black or Puerto Rican. More Black and Puerto Rican children were close to, but awaiting, adoption. The reasons for these differences require further study.

The Mother's Adjustment, Interest, and Services

Three other variables in regard to the biological mothers affected the outcome for the children. When during the first two to three years in placement the caseworker made a negative assessment of the mothers' adjustment, and when the mothers expressed little interest in their children, adoption was more likely. In contrast, when agencies provide casework services to the mothers, children were likely to be discharged.

Procedural Issues

Biological family members and/or foster parents were present at approximately 64% of the hearings.

Counsel for the agencies appeared at approximately one-half of the hearings, with some agencies generally having their counsel present, and others rarely or never having counsel present. There seemed to be no guidelines or rationale as to whether, when, or how agency counsel should be used. Counsels for the Department of Social Services were always present at 392 hearings.

Caseworkers and/or supervisors of the agencies were present at nearly 90% of the hearings.

The court, except in contested cases, relied in the main on casework reports and testimony by caseworkers and their supervisors in arriving at dispositional orders.

In 70 (29.8%) of the 235 cases two or more hearings were held. When such multiple hearings occurred the same judge presided in nine (12.9%) of the cases. Despite the lack of judicial continuity, the positions taken by subsequent judges were generally consistent with those taken by the judge presiding at the initial 392 review hearing. There is no way of assessing whether the outcomes would have been different had there been continuity of judicial personnel.

Agency Responsibility for Compliance with Court Orders

Agencies required to submit reports to the court were frequently tardy in submitting them. Only 144 (61.5%) of the reports were submitted on time. Some were late by only short periods. 35 (15%) had not been received at all by June 1975.

Agency reports were, on the average, least late when continued foster care had been ordered by the court, more often late when the court ordered a child to be freed for adoption, and most often late when the court ordered adoptive placement or discharge.

The reports were rated for substantive compliance with court orders. With generous interpretation, described in this study, three quarters of the reports were rated as in high compliance. However, 32 (17.1%) showed little or no compliance and 13 cases (6.9%) fell somewhere between high and little or no compliance.

Little or no compliance was found most frequently in cases where the court ordered the agency to initiate proceedings to free a child for adoption. Of 58 cases in which such orders had been entered, the agency reports showed little or no compliance in 28 (41.4%) of the cases.

The delay in submitting reports as ordered by the court and the cases in which agencies failed to follow court orders on substantive matters indicate the need for changes in agency policy and procedures to comply with decisions of the court. Internal tracking or monitoring by agencies of compliance with court orders would undoubtedly contribute greatly to the effectiveness of the 392 proceedings.

Effect of Initial Court Review Order on Outcome for Children

The study found that there was a strong relationship between the dispositional order at the initial 392 hearing and the eventual outcome for children.

1. Where discharge was ordered at the initial review, 77.4% of the children had been discharged by June 1975.
2. Where children were ordered to be freed or placed for adoption at the initial review, 90.6% were found in the adoptive group by June 1975.
3. Where continued foster care was ordered with directions for follow-up reports, 26% had been discharged, 20% were in the adoptive group, and 54% were still in foster care in June 1975.

An examination of initial and subsequent court orders also showed that in 80 (34%) of the 235 cases there had been no final 392 disposition by June, 1975, although the court leaned toward either discharge or adoption in most of the follow-up orders. These may have been cases that were particularly complex. Lengthy successive periods given by the court to agencies for submission of reports may well have contributed to delays in the children's movement out of foster care.

Court Responsibility for Enforcement of 392 Decisions

Sec. 392 requires that the Family Court shall review and determine whether children in foster care should be discharged to the biological family, continued in foster care, or be released for adoption.

Ratings of reports from the agencies showed that the agencies had not complied fully with court orders in 24% of the cases. It is therefore necessary for the court to strengthen its procedures to assure implementation of 392 dispositional orders.

In 1974 the court took steps to screen agency reports for timeliness and for compliance. This study would suggest the need for further action:

1. Sufficient qualified staff should be assigned to determine whether agency reports show substantive compliance with court orders.
2. In cases where agency reports indicate failure to comply with court orders for discharge or the institution of proceedings to free children for adoption, or for adoptive placement, the cases should be scheduled promptly for further court hearings.
3. The court should establish a central registry to be kept current on the status of all 392 cases. Such a register should show name, age, and race of child, with date of initial 392 review, court order, subsequent action by agency, present status of child, and outcome for child of 392 proceedings.

The Family Court has the ultimate responsibility for securing compliance with its orders, and should therefore develop whatever monitoring procedures are needed to assure such compliance.

Conclusion

The legislative intent in enacting Section 392 of the Social Services Law was to reduce the number of children who remained in the limbo of foster care, and to secure permanent homes for as many children as possible, either through discharge to their families or through adoptive placement.

This study finds that the 392 reviews have been effective in moving to accomplish this goal. While the greater availability and use of subsidies have contributed to the removal of children from foster care, the 392 procedures encouraged the use of such subsidies.

Further efforts are needed to assure full compliance by agencies with the orders of the court in 392 proceedings. Procedures are needed to provide for effective monitoring of all agency reports for compliance with court orders, and to assure prompt court action when there is inadequate compliance.

The effect of 392 reviews has been cumulative in securing permanent homes through discharge to the biological families or adoptive placements for an increasing number of children in foster care. The greater movement of younger children out of foster care indicates the need for early efforts by both agencies and the court on behalf of children who are placed in foster care when they are older. The positive benefits for children placed in foster care resulting from early casework with their mothers shows the importance of providing services to more families of children placed in foster care.

Finally, the positive value of the 392 review is most clearly evidenced by the increase in the proportion of children removed from foster care between June 1974 and June 1975. This achievement on behalf of children who had been placed in foster care in 1970, and been in such placement from two to five years, runs counter to findings of previous studies.

Between 1974 and 1975 the children in this study were moving out of foster care at a faster rate than in the preceding two years. This was the case although subsidies were available during both time periods, and in spite of the fact that between 1974 and 1975 the children were older and had been in foster care longer. In this way as well, the findings of this study show a cumulative effect of the judicial review under Sec. 392 of the Social Services Law.

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APPENDIX IV

Included here are materials developed for the Commission's study. They are:

1. Questionnaire and Data Collection Form sent to Public and New York City Voluntary agencies
2. Outline for Interviews with Family Court Judges
3. Issue Paper for Family Court Judges
4. Addendum to Survey Form (Item 1, above) sent to those Voluntary Agencies not visited
5. Outline for Interviews with Agency Administrators and Supervisors
6. Outline for Group Interviews With Agency Foster Care and Adoption Workers
7. Agenda for Meeting With Child Welfare Attorneys
8. Agenda for Meeting With Attorneys for Parents or Children

Also included is a listing of the New York City voluntary agencies which responded to the Commission's survey including those personally visited and those not personally interviewed.

THE TEMPORARY STATE COMMISSION
ON CHILD WELFARE

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Chairman

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SURVEY OF LEGAL BARRIERS TO ADOPTION

Before the Temporary State Commission on Child Welfare can assess the present adoption laws, we must have facts -- on how they are being used, if they serve the purpose for which they are intended, and what problems they present. The attached questionnaire is designed to obtain the necessary data.

Your answers to the questions will provide information based on your first-hand experience. It will ensure that the recommendations made by the Commission will reflect the realities of the situation.

Thank you very much for taking the time and trouble to help us.

Please fill out:

______________________________, 1975

____
Person Completing Form

____
Title

____
Name of Agency

July 8, 1975

SURVEY OF LEGAL BARRIERS TO ADOPTION

I. We are interested in learning more about the procedures to free and place children for adoption in New York State. We want specifically to learn about procedures/petitions initiated or filed in 1973 and also to get some information about the "fate" of these cases. Please help us by giving us the number of children who fall into each of the categories below.

	Permanent Surrender	Permanent Neglect	Abandonment	Any Other
Total number of petitions/ procedures initiated in 1973. ↓				
Of those initiated, number of children freed by May 1, 1975. ↓				
Of those freed, number of children adopted by May 1, 1975. ↓				
How many of these adoptions were subsidized? ↓				
How many of these subsidies were general support subsidies? ↓				
How many of these subsidies were medical subsidies?				
Petitions that were dismissed or judgment suspended.	╳			
Petitions withdrawn after surrender by parent(s).	╳			

How many petitions were initiated in 1973 and were not filed? ____________________
Number

What prevented filing of these petitions? ______________________________

____

II. THE FOLLOWING QUESTIONS ADDRESS THE 24-MONTH FOSTER CARE REVIEW HEARINGS. WE ARE INTERESTED ONLY IN CASES REVIEWED BY THE COURT IN 1973.

1. First tell us the number of each of the agency recommendations made (Short-term goal)

Agency Recommendations (Short-term goal)	Number
To explore freeing for adoption	________
To place child for adoption	________
To explore discharge of child to parent, guardian or relative	________
To discharge child to parent, guardian or relative	________
To continue foster care	________
Other(Specify):____________________	________

2. Now for those cases reviewed by the court in 1973. Indicate number of each type of Court Order which resulted.

a. Court Order to institute proceedings to free children.

____
Number of Orders

Of these, how many proceedings were instituted within 12 months following the Order?

____
Number Proceedings Instituted

In addition, how many proceedings were instituted after 12 months and before 5/75.

____
Number Additional Proceedings Instituted

Of these, how many voluntary surrenders were obtained within 12 months?

____
Number Voluntary Surrenders

In addition, how many voluntary surrenders were obtained after 12 months and before 5/75.

____
Number Additional Voluntary Surrenders

II. 24-MONTH FOSTER CARE REVIEW HEARINGS (Continued)

b. Court Order to place child for adoption.

________ Number of Orders → Of these how many were placed within 12 months?

________ Number Placed

→ In addition, how many were placed after 12 months and before 5/75?

________ Additional Number Placed

c. Court Order to return child to parent, guardian or relative.

________ Number of Orders → Of these, how many were returned to parent, guardian or relative within 12 months?

________ Number Returned

→ In addition, how many were returned after 12 months and before 5/75?

________ Additional Number Returned

d. Court Order to continue foster care. (No further action)

________ Number of Orders → Of these how many were continued in foster care for 12 months?

________ Number Continued

e. Court Order of Protection.

________ Number of Orders → Of these how many of these Orders were carried out within 12 months?

________ Number Carried Out

→ In addition, how many were carried out after 12 months and before 5/75?

________ Additional Number Carried Out

f. What other Court Orders were specified?
(Describe and indicate number of cases)

Specify:

____

____

____

________________ Number → How many of these Orders were carried out within 12 months?

________________ Number Carried Out

→ In addition, how many were carried out after 12 months and before 5/75?

________________ Additional Number Carried Out

____

____

____

________________ Number → How many of these Orders were carried out within 12 months?

________________ Number Carried Out

→ In addition, how many were carried out after 12 months and before 5/75?

________________ Additional Number Carried Out

III. MORE ON 24-MONTH FOSTER CARE REVIEW HEARINGS AND TERMINATION OF PARENTAL RIGHTS HEARINGS

1a. Who is the agency's legal representative? (CHECK ONLY ONE IN EACH CATEGORY)

FOSTER CARE REVIEW	TERMINATION OF PARENTAL RIGHTS HEARINGS
☐ The agency's attorney	☐ The agency's attorney
☐ The corporation counsel	☐ The corporation counsel
☐ The county attorney	☐ The county attorney
☐ Other____________________ Specify	☐ Other____________________ Specify
☐ No legal representative	☐ No legal representative

1b. Does he/she specialize in child welfare legal services?

☐ Yes ☐ No	☐ Yes ☐ No

IV. SPECIALIZED PERSONNEL ON FREEING AND PLACING CHILDREN FOR ADOPTION

a) We are interested in knowing whether you have specialized personnel whose primary function is in the freeing or placing of children for adoption. (CHECK THE CATEGORY THAT BEST DESCRIBES YOUR AGENCY)

☐ A specified worker(s) whose primary function is the review of the total agency foster caseload to identify children who are eligible to be freed for adoption.

☐ A specified worker(s) assigned to conduct diligent searches and to prepare legal documentation (legal availability unit).

☐ Other workers whose primary responsibility is the freeing of children. Specify:____

____

b) Do you have an autonomous adoption unit in your agency?

☐ Yes ☐ No

If "Yes", how many caseworkers are in the Unit? ____________ Number of Caseworkers

How many supervisors? ____________ Number of Supervisors

What services are performed by this Unit? (Specify in space provided below)

____

____

____

____

IV. SPECIALIZED PERSONNEL (Continued)

c) If you have no adoption Unit at present, please state why, i.e., agency deals primarily with adolescents ____________________

____

V. TRAINING SESSIONS ON ADOPTION

Were training sessions for foster care workers given in the past 12 months?

☐ Yes ☐ No

If "Yes", were the following topics covered? CHECK ALL TOPICS COVERED.

- ☐ Laws on Termination of Parental Rights.
- ☐ Provisions of the 24-month Foster Care Review Law.
- ☐ Legal Procedures for Freeing of Children.
- ☐ Planning Decisions on Freeing of Children.
- ☐ Guidelines for Obtaining Voluntary Surrenders.
- ☐ Adoption by Foster Parents.
- ☐ Adoption Subsidy.
- ☐ Interpretation of "moral and temporal interests of child".
- ☐ Other: ____________________ Specify

Were training sessions for adoption workers given in the past 12 months?

☐ Yes ☐ No

If "Yes", were the following topics covered? CHECK ALL TOPICS COVERED.

- ☐ Recruitment techniques: Use of Mass Media.
- ☐ Recruitment techniques: Use of adoption subsidy.
- ☐ Recruitment from minority groups.
- ☐ Recruitment of adoptive families for the physically or mentally handicapped child.
- ☐ Adoption in Today's Society.
- ☐ Other: ____________________ Specify

VI. Now, some final questions!

1. In the past 12 months, how many of your adoption cases have been filed in the:

Family Court? ____________ (Number) Surrogate Court? ____________ (Number)

What are the reasons for the selection of the Family Court or the Surrogate Court for these cases?

2. At the present time, how many cases are you carrying of children who are legally freed but not yet placed in adoptive homes?

____________ Number

3. At the present time, how many cases are legally freed and in adoptive homes, but not yet legally adopted?

____________ Number

THANK YOU FOR YOUR HELP!

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BARRIERS TO THE FREEING OF CHILDREN FOR ADOPTION

1. Outline for Interviews with Family Court Judges
2. The Issues

The questions in the enclosed outline (Item A) were developed from interviews with a number of Family Court Judges, Surrogates and Attorneys -- all recognized authorities on New York State's adoption laws. Each was asked to assess New York State's legislation and its administrative policies and practices pertaining to the freeing of children for adoption. Twelve issues emerged as critical to discussion of the subject. They are presented in Item B.

Family Court Judges in seven social services districts in New York State have been invited to assist the Temporary State Commission on Child Welfare in developing recommendations to facilitate adoption, where it is appropriate. The Judges will meet to define the problems as they see them, whether in the statutes or in their implementation. They will recommend both legislative and administrative remedies.

Item A outlines a series of questions that concern the Commission. Item B highlights some of the diverse views expressed in the interviews with the aforementioned authorities in the adoption field. These views may be of interest to the Judges assisting the Commission.

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ITEM A

OUTLINE FOR INTERVIEWS WITH FAMILY COURT JUDGES

1. What in your view are the major differences in the Abandonment Statute (Social Services Law S. 371 and S. 384) and Permanent Termination of Parental Custody by Reason of Permanent Neglect (Article 6, Family Court Act)? Must an intent not to care for the child be demonstrated or can it be inferred from a course of conduct in an abandonment proceeding? Are there safeguards afforded to parents in permanent neglect proceedings which are not, but should be, afforded to parents in abandonment proceedings?

2. Do you believe that the substantive provisions of the Permanent Neglect Statute (failure to maintain contact with the child substantially, continuously or repeatedly or failure to plan for the future of the child, financial and physical ability) should be defined further? If so, how?

3. Do you recommend any changes or additions in the substantive provisions of the Permanent Neglect Statute? For example, do you consider it appropriate to provide as grounds for termination of parental rights extreme abuse or neglect?

4. With respect to the "diligent efforts requirement," how do different agencies describe the services they provide to encourage and strengthen family relationships? Are there significant differences in the activities of different voluntary agencies and the Department of Social Services? In your experience, do agencies have the capacities to perform their mandated role? Who (the Court or the Department of Social Services) should monitor the decision of a caseworker or voluntary agency to deny visitation?

5. Where a child remains in foster care for a given period of time (one year, eighteen months, two years, three years, four years) do you favor an amendemnt to the law in which such a situation would be deemed to establish a presumption of permanent neglect, a prima facie case of permanent neglect or a duty of the respondent to come forward with countering evidence?

6. Do you believe that the existence of an adoptive home should be the precondition for the freeing of a child? Should this precondition be stated in the statute or in rules and regulations? If you oppose this precondition, how would you describe the benefits to a child of being freed without being adopted?

7. Should there be a separate statutory period specified for a finding of abandonment or permanent neglect for children under the age of one (or another given age) to expedite the freeing of children most eligible for adoption?

8. When handling adoptions, do Family Court Judges apply the same standards to abandonment under the Domestic Relations Law (S.111) as are given in the Social Services Law (S. 384)? If not, what standards? What criteria are used for dispensing with parental consent on such other grounds in the Domestic Relations Law as insanity, mental retardation, cruelty, neglect, deprivation of civil rights?

9. Do you recommend any procedural changes in the 24-month review and in termination of parental rights proceedings? Any administrative changes?

10. Do you recommend any changes in the content or method of presentation of permanent neglect and abandonment cases by authorized agencies, their lawyers and caseworkers? Would you recommend that these cases be presented only by lawyers who deal exclusively with child welfare cases? Do caseworkers require special training in applying the provisions of these two statutes?

11. With respect to the Social Service Law, S. 392 (Foster Care Status, Periodic Family Court Review):

    a. What have been the major benefits and major problems related to the mandatory 24-month review in your county?

    b. Should the time period be shortened for the first review and, if so, specify the time period and reason for its selection.

    c. How should agency compliance with the Court's orders be monitored?

    d. How have you used the following provisions of the Social Services Law, S. 392, and how have agencies responded to your orders?

       Subdivision 7(b): directing the child to be returned to the parent, guardian or relative;

       Subdivision 7(c): directing the agency to institute proceedings to legally free the child for adoption and permitting the foster parent to institute the proceedings if the agency should fail to do so within 30 days;

       Subdivision 9: directing the agency to undertake diligent efforts to encourage and strengthen the parental relationship.

    e. How do you deal with an agency's failure and/or refusal to follow your orders?

12. If the Legislature were to revise the laws on abandonment and permanent neglect so as to create one uniform law for terminating parental rights, would you favor exclusive Family Court jurisdiction? What would be the problems of giving the Surrogate Court concurrent jurisdiction?

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ITEM B THE ISSUES

1. The distinction between Abandonment (Social Services Law, S. 371 and S. 384 and Permanent Neglect (Family Court Act, Article 6).

The concept of permanent neglect was added (1959) to the New York State Children's Court Act and Domestic Relations Court Act in order to avoid the problems created by the New York State's Court of Appeals ruling that "abandonment" requires the proof of a "settled purposed to forgo forever all parental rights," according to one of the draftsmen of the statute. This statute established a new legal category, "permanent neglect," as an additional procedure for terminating parental rights. As stated by Governor Rockefeller in approving the legislation: "Under existing law [Social Services Law, S. 371 and S. 384] a great many children are doomed to grow up in institutions or foster homes at public expense and are prevented from forming normal,lasting family relationships, because minimal contacts between a parent and child in an institution or foster home act as a bar against a judical finding that the child has been abandoned. Such a finding is necessary in order to permit the adoption of the child without parental consent..."

The purpose of the Permanent Neglect Statute is very different from that of the Abandonment Statute, according to some of the interviewees, because it focuses not on the parent's intent but on the child's need. Every child has a right to a home and permanent family relationships. The Permanent Neglect Statute is intended to provide a means for attaining that right.

Some authorities, however, suggest that the distinction between the two statutes began to be blurred in 1969 when the New York State Legislature shortened the statutory period of abandonment from one year to six months. The shorter period had the same legislative purpose as the Permanent Neglect Statute, i.e. to facilitate the movement of children from foster care to adoptive homes.

All agreed that the procedural safeguards should be the same in both laws and equally as clear in one as in the other.

At issue now is whether the two statutes serve different purposes. If not, they should be consolidated.

2. Clarification of substantive provisions in the Permanent Neglect Statute

Those interviewed took directly opposing positions on the desirability of clarifying Family Court Act, S.611 and S. 614. Proponents of further clarification point out the absence of a consensus among Family Court Judges on the meaning of key provisions, as: that the parent or custodian, 1.) "substantially and continuously or repeatedly maintain contact with," and 2.) "or plan for the future of the child." No guidelines exist, they state, on these or on 3.) "the agency's diligent efforts to encourage and strengthen the parental relationships," nor do criteria exist for interpreting, 4.) "the moral and temporal interest of the child." The meaning of these terms must be specified in the law, they declare, in language understandable to all concerned: The Court, the Department of Social Services, the parents and the lawyers who represent the opposing parties.

Some of these proponents maintain that the law must set standards by which the Judge can measure the custodial abilities of the parents. Others call for a reassessment of the provisions of "contact" and "or plan" as appropriate indices of capabilities of caring for children.

It is a minority point of view among the interviewees that further definition is ill-advised. The wide spectrum of life situations, they say, makes it impossible to apply the same standards to each one. In the view of one Judge, the law does provide a reasonable criterion, "a fair preponderance of the evidence:" using this measurement, in a fact-finding hearing, "each Judge must work through an approach where he really looks at the past as well as the present, and decides how meaningful these visits have been, whether they have caused so much unhappiness that the child has not been able to settle down anywhere, whether his real hope is with his parents, and what will happen to him if permanent neglect isn't established so that he can put roots in a different, permanent family." One Judge suggested that only useful redefinition might be to stipulate that the contact be "meaningful" rather than "substantial, continuous or repeated."

This minority reasons that the "planning" envisioned by the statute clearly includes actions that enable the return of the child to his home. Planning is defined as "actions showing that the parent has taken steps necessary for the return of the child."

3. Changes in substantive provisions

A majority of those interviewed recommended that Article 10 of the Family Court Act be amended to include extreme, repeated abuse or neglect as grounds for permanent termination of parental rights and that reference to this amendment be made in Article 6. This reference would state that, notwithstanding the present provisions of Article 6, whenever the Court finds conduct which involves serious, repeated neglect or serious repeated abuse by the parent, the Court may of its own motion direct that a proceeding permanently to terminate the parents' rights may be initiated.

A number of safeguards were suggested. Among them were: 1.) The Judge who orders the proceedings should not be the Judge who hears the case. 2.) Termination of parental rights should be possible only where it can be shown that the parent will never be able to care properly for the child. 3.) An appropriate statute should define the degree of neglect or abuse which is the cause for termination.

One Judge dissented because his own experience had demonstrated that abusing parents sometimes are successfully rehabilitated.

Additional recommendations included: 1.) the elimination of the "physically able" provision of the permanent neglect statute; 2.) an amendment to provide one criterion - the best interest of the child in making an order of disposition in the permanent neglect proceedings; 3.) the addition of mental retardation to mental illness as grounds for termination in abandonment proceedings; 4.) the review of all provisions for termination in the Domestic Relations Law, S. 111 and their inclusion in one unified statute on termination.

Several interviewees opposed any amendments to the laws as futile on the grounds that the basic flaw is not in the law itself. According to one view, the major block is the belief commonly held both by the community and by many Judges that the rights of the natural parents take precedence over the best interests of the child. According to another view, the flaw lies in the failure of the Department of Social Services and other authorized agencies to fulfill their responsibilities, with the result that by the time the case comes before the Court, the statute is irrelevant as written.

4. The "diligent effort" requirement

On the whole, interviewees did not isolate the types of services successful in strengthening parents' capability to care for the child. They reported that agency policies on visitation differ greatly. Some agencies permit the parent to visit only once a month for a two-hour period in an impersonal group setting that is not conducive to a good parent-child contact. Often they wait for the parent to request help. By contrast, other agencies put forth tremendous effort to locate a missing parent, have workers with necessary diagnostic skills to recognize pathology and to provide treatment as well as the willingness to solve practical problems. Such agency efforts often make possible the return of the child to its parents.

The recommendations were: 1.) retaining the requirement to protect the rights of the natural parent and to spur the agency to fulfill the responsibilities for which it is being paid: 2.) retaining it one year only, during which time the agency would undertake a "crash program" to encourage parental care of the child; (after the year the agency would be free to initiate termination proceedings); 3.) eliminating it because it penalizes the child for the agency's shortcomings,does not permit the parent to take the initiative in proving interest in his child, places the agency in an untenable position, in conflict with the interest of either the child or the parent, and expects the agency to do jobs at which it is not adept; 4.) transferring it from the Family Court Act to The Social Services Law (Section on the duties and responsibilities of the Commissioner), thereby creating a statutory liability for agencies that do not fulfill their responsibilities.

5. The establishment of a "presumption" of permanent neglect

Only a minority recommended that the law be amended to provide that a situation in which a child remains in foster care for a given period of time be deemed to establish a presumption of permanent neglect, a prima facie case of permanent neglect or a duty of the respondent to come forward with countering evidence. The time period recommended ranged from one to four years.

One Judge stated that the presumption should apply only to situations in which the child had stayed in the same home for a given period of time. The majority opposed the presumption on grounds that: 1.) it is unnecessary as a competent agency should have evidence to justify termination: 2.) even though it is rebuttable, the judge will be wary of using it because of fears that the parents have not been properly served with notice and do not have the information needed to protect their rights.

6. An adoptive home as the preconditon for the freeing of a child

Proceedings to free a child should not be initiated when foster parents do not wish to adopt and when other adoptive parents cannot be found, maintains one group of interviewees. They argue that agencies and courts should not be required to spend time on lengthy termination proceedings if there is no likelihood of adoption, but should be permitted to concentrate on cases for whom adoptive homes can be found. By contrast, in the words of a leading opponent to this position: "Every child should be considered as adoptable as a matter of policy.Judges should be educated to understand that every child is adoptable unless profoundly retarded or unless it has such a series of physical problems that there is practically no hope of the child having any reasonable health or of a parent finding any possible way of loving and nurturing that child."

The majority of those interviewed are opposed to a precondition of an adoptive home for freeing a child because they believe it perpetuates a myth that large numbers of children cannot be adopted. Agencies should be encouraged to use their resources to develop a pool of adoptive homes for older children with special needs. Moreover, in the opinion of some judges, older children should be freed from the negative influences of their parents even with no adoptive home available so that they are able to develop healthy relationships with foster parents.

One judge recommended that the State Department of Social Services include a directive in Rules and Regulations to initiate termination proceedings in the absence of an adoptive home.

7. The provision of a separate statutory period for the very young

It was recommended by some interviewees that a method be found to facilitate the freeing of children who are under the age of one and are therefore the easiest to place. Those who oppose this recommendation argue that: 1.) it would hurt the children who need help the most; 2.) there is no need to clutter up the statutory structure with the age exceptions; 3.) it would be unconstitutional to have a separate provision that applies to children based on the likelihood of their adoptability.

8. The provisions for dispensing with parental consent for adoption in the Domestic Relations Law (S. 111) compared with termination of parental rights provisions in the Social Services Law (S.384).

The Family Court Judges interviewed expressed interest in learning how their colleagues handle proceedings for dispensing with parental consent in adoptions.

9. Procedural and/or administrative changes in 24-month and in termination proceedings.

Recommendations included: 1.) priority in calendaring should be given to petitions for termination of parental rights as is given to juvenile delinquency of PINS petitions when the child is in detention; 2.) the statute should specify the maximum length of time for adjournments; 3.) the agency's initial decision to terminate parental rights should be subject to court review; 4.) publication should cease to be required in the Law Journal (because natural parents are least likely to read this publication and the cost is exorbitant); 5.) authorization should be secured for the state to pay all publication costs in adoption cases; 6.) the restrictions on evidence based on the confidentiality either of a parent-physician relationship or of a parent-certified social worker relationship; 7.) assignment of independent counsel to the child in a S. 392 proceeding.

The recommendations on priority calendaring was opposed by some interviewees on the grounds that the existing number of proceedings that have strict time requirements are creating overwhelming difficulties, particularly in metropolitan areas. Priorities and time limits create difficulties in serving notices and in giving adequate time to each case.

Several questions were raised for further consideration: How should a judge make a decision on giving notice of the proposed adoption to those parents whose rights have been terminated under the Domestic Relations Law, Section 111? After a finding of permanent neglect in Article 6 of the Family Court Act, should a judge have discretion or should he be mandated to terminate parental rights?

10. Agency presentation in termination proceedings

Judges agree that materials are not properly prepared, assembled and presented for the consideration of the court. The casework record, the basis for the agency's evidence, often lacks the necessary objective facts. Furthermore, the caseworker whose orientation and training are not in an adversary capacity is uncertain and fearful before the Court. As a result, the agencies do not move with dispatch in initiating proceedings and caseworkers are not responsive to the Judge's questions. In addition, the lawyers who present child welfare cases are often inexperienced and have neither the interest nor the motivation to present the case effectively. It was reported in various parts of the state that lawyers come to court without adequate preparation and are unable to bring out the salient points of the case.

Recommendations include: 1.) the state should pay for specialized training of caseworkers and lawyers on adoption legislation; 2.) the caseworker should have access to legal help in preparing the case; 3.) private agencies should receive adequate reimbursement for legal fees so that they can have effective legal representation (with reimbursement rates determined on the basis of a cost-effective formula): 4.) the State Department of Social Services should make available regional counsels (outside New York City) with expertise in adoption legislation for county agencies.

11. The Social Services Law S. 392 (Foster Care Status, Periodic Family Court Review)

a. Benefits and problems related to the 24-month review

At the outset, as a result of the foster care review hearings, a substantial number of children had been released from foster care, according to several judges. These numbers are decreasing, they state. Everyone interviewed agrees that the greatest benefit of the law is that it reminds agencies of their responsibility to keep current on the status and planning for the children in foster care.

Despite the widespread agreement on the value of court review, some reservations were expressed. For one, the court is seriously hampered in assessing the child's situation and the agency's recommendations because the Judges have only the evidence provided by the agencies. Some Judges believe that they have little recourse but to agree with agency recommendations. For another, the volume of cases has overwhelmed the calendar in some counties. Nonetheless, most Judges believe that S. 392 must be retained in order to keep abreast with changes in the child's situation.

A problem lies in serving a parent with a summons for the review if he is out of the city and in the consequences of his absence from the hearing. Under these circumstances, can the court order the agency to begin proceedings for freeing a child, it has been asked.

It was recommended that in order for the court to have independent evidence, 1.) a social worker be assigned to the court with responsibility only for reviewing the agency's evidence and for assembling other data; or 2.) a law guardian be assigned to the child with responsibility to gather all evidence in his behalf.

b. Scheduling of reviews

It was suggested that the first review period be shortened either to 18 months or to one year. Some favor 18 months on the basis that it would conform to the extension of placement hearings for the child placed by the court as neglected or delinquent. A Judge pointed out that this shorter time period, while desirable would present special problems in New York City (inability of agencies to follow-up on court orders on freeing for adoption because of the monitoring role of the City Department of Social Services.)

Those who advocate one year reviews suggest that the time periods of extension of placements also be shortened. The consensus was that subsequent hearings be two years apart; many felt that one year was desirable but impractical.

One Judge recommended that a new statute - permanent foster care - be instituted for children who could neither be freed nor returned home. Establishment of this status would eliminate time-consuming re-hearings whose repetition may be demeaning to the foster parent and does not help the child.

c. Agency compliance with court orders

Some judges held that the Family Court should have contempt authority to cite agencies for failure to comply with review orders. Otherwise a mockery can be made of the judge's orders, they assert. Others believe that the contempt citation is limited in its usefulness and that other methods should be found to deal with uncooperative agencies. Where there are a number of voluntary agencies, the judges should be given the power to transfer the child to another agency.

Others suggested that the court require reports and schedule a hearing on these reports, so that both the court and the agency are required to review the findings. Some judges automatically reschedule hearings to ensure follow-up.

The agencies' point of view was presented by some lawyers who report that the agencies do not comply because the orders are not clear and time limits have not been set.

d. Use of S. 392 Subd.7 (b), Subd.7 (c) and Subd.9

(The interviewees made no comments on these points.)

12. The jurisdictional issue

Family Court Judges interviewed did not address this issue. One Surrogate believes that Surrogates and Family Court Judges should have concurrent jurisdiction over permanent neglect as well as abandonment with the provision that if the Surrogate finds that the Court's social service resources are not adequate, he has the authority, on his own, to transfer the case to the Family Court. The second Surrogate believes that Surrogates do not have the necessary background and experience to deal with permanent neglect.

ADDENDUM TO THE SURVEY

LEGAL BARRIERS TO ADOPTION

(ADDENDUM SENT ONLY TO THOSE VOLUNTARY AGENCIES NOT VISITED)

1. Does your agency have a policy statement on Standards of Practice for Adoption Services? Does your agency have any other written statements on your policy on the freeing and placement of children for adoption? Please enclose all written material.

2. Do any provisions of the laws to terminate parental rights (Article 6 of the Family Court Act - Permanent Neglect; Section 384 of the Social Services Law - Abandonment; Section 111 of the Domestic Relations Law - Dispensing with Parental Consent) impede your agency's efforts to free children? If so, which? Does your agency rely on one or more of these legal procedures to the exclusion of others? If so, why? What changes would you recommend in these laws?

3. Are there any financial, personnel or organizational obstacles to adoptive planning? Please describe these obstacles and your recommendations for overcoming them.

4. What services does your agency provide in carrying out the "diligent efforts" requirement to strengthen the parental relationship (Sections 611 and 614 of the Family Court Act)?

   ☐ Family counseling on a regular basis ____________________
   How frequently?

   ☐ Visits to the mother's home to discuss her problem __________
   How often?

   ☐ Arrangements for specialized treatment ____________________
   How do you follow-up?

   ☐ Facilitation of parental visits to the child:

   a) Are visits arranged: weekly ☐, or monthly ☐ ?

   b) Approximately how much money was allocated for parents' transportation last year?

   $ ____________________
   Amount

   ☐ Help in obtaining public assistance.

   ☐ Help in setting up a suitable home.

☐ Child care education.

☐ Employment counseling.

☐ Homemakers services.

☐ Day care services.

Which of the above services have you found the most useful in reuniting families? What obstacles, if any, prevent you from providing such services?

* * *

Please use this space to answer the above questions. Please let us know any additional views you have on 1) the major obstacles to adoption; and 2) administrative and legislative remedies.

THE TEMPORARY STATE COMMISSION ON CHILD WELFARE

SENATOR JOSEPH R. PISANI
Chairman

ROOM 203
STATE OFFICE BUILDING
270 BROADWAY
NEW YORK, N.Y. 10007
212-488-4843

ITEM I LEGAL BARRIERS TO ADOPTION

Outline for Interviews with Agency Administrators and Supervisors

1. Does your agency have a policy statement on standards of Practice for Adoption Services? Does your agency have any other written statements on your policy on the freeing and placement of children for adoption?

2. In your agency, are there organizational obstacles to the freeing and placement of children? What are they? Should the freeing of children be the responsibility of the foster care unit, the adoption unit or of a separate specialized unit? Do you have any procedures for coordinating the foster care, adoption and legal units?

3. Are there personnel obstacles to adoptive planning? Ideally, what academic and/or other qualifications would you prescribe for workers in the foster care unit? Workers in the adoption unit?

4. From the point of view of your agency, are there financial obstacles to adoptive planning? What changes would you recommend in reimbursement formulae and in adoption subsidies? Is your agency reimbursed for the location of adoptive homes?

5. What services does your agency provide in carrying out the "diligent efforts" requirement to strengthen the parental relationship (Sections 611 and 614 of the Family Court Act)? For example:

   ☐ Family counseling on a regular basis ______________
   How frequently?

   ☐ Visits to the mother's home to discuss her problem ______
   How often

(Question 5 continued on page 2).

☐ Arrangements for specialized treatment ____________________
How do you follow-up?

☐ Facilitation of parental visits to the child:

a) Are visits arranged: weekly ☐, or monthly ☐ ?

b) Where do the majority of visits take place
i.e. ☐ at agency office, ☐ at the foster home,
☐ at parent home, ☐ Other: ______________
Specify
____

c) What arrangements are made to ensure that these visits are as meaningful as possible i.e. help to the parent in relating to the child; suggestions for activities such as visits to the park; counseling to parents on concrete problems that arise:
____
____
____

d) Approximately how much money was allocated for transportation for parental visits last year? $________
Were additional monies given in this period to parents for activities related to these visits? If so, how much? $________

e) Describe your agency's policies and practices governing a child's visit to his parent(s).
____
____
____

☐ Help in obtaining public assistance.

☐ Help in setting up a suitable home.

☐ Child care education.

☐ Employment counseling.

☐ Homemakers services.

☐ Day care services.

6. How do you assess the advantages and disadvantages of the "24-month foster care review" hearing? Does your agency have a procedure for monitoring the Court's orders? Is this procedure satisfactory? How does your agency respond to court orders that you believe are not in the best interests of the child?

7. Do any provisions of the laws to terminate parental rights (Article 6 of the Family Court Act - Permanent Neglect; Section 384 of the Social Services Law - Abandonment; Section 111 of the Domestic Relations Law - Dispensing with Parental Consent) impede your agency's efforts to free children? If so, which? Does your agency rely on one or more of these legal procedures to the exclusion of others? If so, why? What changes would you recommend in these laws?

8. Regarding adoption by foster parents: How has recent legislation on adoption by foster parents affected the relationship of foster parents to your agency? Should there be a change in criteria for selection of foster parents as well as of adoptive parents? What changes? What are your agency's written statements on adoption by foster parents?

9. How would you like to see "permanent" (long-term) foster care defined? How would you select the children for "permanent" foster care?

10. How can the State Department of Social Services and the State Board of Social Welfare assist you in your efforts to free and place children? What changes would you like to see in the Department of Social Services' rules and regulations? What resources from the Department of Social Services would be helpful to you?

11. Does your agency and its legal representative(s) meet periodically with Family Court Judges to discuss State Department of Social Services' Administrative and Informational Letters on the freeing and placement of children for adoption? Are the Family Court Judges and your agency equally informed about adoption procedures including adoption subsidy?

12. Do you believe there should be joint guidelines promulgated by the Office of Court Administration and by the State Department of Social Services on the freeing and placement of children in public care for adoption?

July 10, 1975

THE TEMPORARY STATE COMMISSION
ON CHILD WELFARE

SENATOR JOSEPH R. PISANI
Chairman

ROOM 203
STATE OFFICE BUILDING
270 BROADWAY
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ITEM II LEGAL BARRIERS TO ADOPTION

Outline for Group Interviews with Agency Foster Care and Adoption Workers

1. Regarding adoption by foster parents: Periodically, do you assess your case load of foster parents to find likely adoptive parents? Should foster parents be permitted to take on foster children after they have become adoptive parents? Should foster parents have professional status?

2. Regarding recruitment of adoptive parents: Do you believe you can recruit a pool of adoptive parents for children, once they become freed? What is your experience in the use of the Statewide Exchange? What about the picture book? Do you believe several methods can be combined, i.e., the picture book with Statewide Exchange? What experience have you had with ARENA?

3. Regarding adoption subsidy: How do you feel about the use of subsidy? How extensively is adoption subsidy used? In your opinion, is it used as fully as it should be? If not, what suggestions would you make for greater use?

4. What is your perception of your agency's policy on the termination of parental rights? Do you believe it is an affirmative one?

5. What type of legal assistance do you have in deciding whether the following legal procedures should be used in the freeing of a particular child?

   a. Voluntary Surrender (SSL 384 Sub. 1)

   b. Abandonment (SSL 384)

   c. Permanent Neglect (Family Court Act, Article 6)

   d. Mental Illness of Parent (SSL 384 Sub.7)

(Question 5 continued on page 2).

e. Consent not required for adoption by "a parent who has abandoned the child or who has surrendered the child...for whose child a grardian has been appointed under the provisions of section three hundred eighty-four of the Social Services Law or who has been deprived of civil rights or who is insane or who has been judicially declared incompetent or who is mentally retarded as defined by the mental hygiene law..." (Domestic Relations Law S.111)

6. What amount of time do you estimate that it takes you to prepare a case for each of the above procedures?

7. What type of help do you believe you need from your agency attorney in preparing a termination of parental rights case? For example:

   a) Has he/she outlined for you the type of evidence that you must provide?

   b) Has he/she advised you what is expected of you in court, your rights as a witness, and what the judge has a right to do?

   c) Generally, how many times do you see your attorney before you go to court on one of these proceedings?

   d) Generally, how long are sessions with the attorney?

8. What services does your agency provide in carrying out the "diligent efforts" requirement to strengthen the parental relationship (Sections 611 and 614 of the Family Court Act)? For example:

   ☐ Family counseling on a regular basis ____________________
   How frequently?

   ☐ Visits to the mother's home to discuss her problem ______________
   How often?

   ☐ Arrangements for specialized treatment ____________________
   How do you follow-up?

   ☐ Facilitation of parental visits to the child:

   a) Are visits arranged: weekly ☐, or monthly ☐ ?

   b) Where do the majority of visits take place
   i.e. ☐ at agency office, ☐ at the foster home,
   ☐ at parent home, ☐ Other: ____________________
   Specify

   ____

c) What arrangements are made to ensure that these visits are as meaningful as possible i.e. help to the parent in relating to the child; suggestions for activities such as visits to the park; counseling to parents on concrete problems that arise:

____

____

____

d) Approximately how much money was allocated for transportation for parental visits last year? $__________ Were additional monies given in this period to parents for activities related to these visits? If so, how much? $__________

e) Describe your agency's policies and practices governing a child's visit to his parent(s).

____

____

____

☐ Help in obtaining public assistance.

☐ Help in setting up a suitable home.

☐ Child care education.

☐ Employment counseling.

☐ Homemakers services.

☐ Day care services.

9. Do you believe that the permanent neglect statute requirements and sound casework practice are in conflict. If so, how?

10. What changes would you like to see in the laws terminating parental rights? For example:

a) Do you believe that parents' rights should be terminated when there is evidence of extreme abuse or continuing neglect? If so, what criteria would you establish for the degree of abuse and for the length of neglect?

b) Do you believe that a child should be freed after he has been in foster care for a certain period of time? If so, what period?

c) Should an adoptive home be a precondition for the freeing of a child? What reservations do you have about freeing a child without an adoptive home?

d) Others?

11. Regarding the foster-care 24-month review hearings and termination proceedings:

    a) What have been the major benefits and major problems of the 24-month review?

    b) In either the 24-month review and/or termination proceedings, have you ever received orders from the judge that you believe are not in the best interests of the child and what have you done as a result? Do you believe that your agency has the staff resources, i.e., attorneys, psychiatrists, needed to carry out court orders?

    c) Do you find that the judge's orders are clearly stated?

    d) How does your agency monitor the 24-month review hearings? Should your agency have a special unit with responsibility for monitoring the court's orders and for assisting you in preparing a termination of parental rights case?

12. Have you found that more of your termination cases are being challenged now than before? Roughly, in what proportion of your cases has the judge ruled against your recommendation? Why do you believe you lost the case? If you disagreed with the judge's decision, did your agency take an appeal? If not, why not? Have adverse court rulings in or out of your court discouraged you from bringing a case to court? Specify these court rulings.

13. Have recent changes in the laws: 1) terminating parental rights (permanent neglect and abandonment), 2) in the adoption laws, 3) in adoption subsidy helped or hindered your efforts to free children for adoption?

July 10, 1975

AGENDA

LEGAL BARRIERS TO ADOPTION

Meeting of Child Welfare Attorneys - October 7, 1975

1. To what extent does the retention of two separate legal procedures -- abandonment -- (Social Services Law, Sec. 371 and 384) - and -- permanent neglect -- (Family Court Act, Article 6) - facilitate or hinder the freeing of children for adoption? Please comment on both the substantive provisions and the procedural standards of these laws.
2. What changes would you recommend in the substantive provisions and the procedural standards of both laws to facilitate the freeing of children for adoption?
3. To what extent has the law terminating parental rights on the grounds of mental illness and mental retardation (Social Services Law, Sec. 384, Subd. 7) proven helpful or difficult in the freeing of children for adoption? What specific problems have you encountered and what remedies would you suggest?
4. To what extent has the foster care review law (Social Services Law Sec. 392) been helpful, a hindrance or of no impact in the freeing of children for adoption?
5. What are the principal problems which you have experienced with respect to the rights of the adjudicated out-of-wedlock father and what solutions would you propose?
6. What are the principal problems you have experienced and what solutions would you propose with respect to the rights of the putative father?
7. How do policies and practices of agencies that you represent effect the freeing of children for adoption e.g. agency visitation policies, record keeping practices, use of your services by the staff or other practices you may wish to cite. To what extent should attorneys participate in the establishment of policies on the termination of parental rights? In the training of workers?
8. What experiences have you had (particularly in recent months) with the statements given by judges as their reasons for their dispositions in foster care review hearings?
9. Are there any changes needed in court procedures to expedite the freeing of children for adoption? What changes would you suggest?
10. What other matters aid and/or hinder you in the freeing of children for adoption?

AGENDA

LEGAL BARRIERS TO ADOPTION PROJECT

Meeting of Attorneys for Parents or Children in Termination Proceedings

1. Social Services Law, Section 384 transfers guardianship and custody of the child to an authorized agency. Family Court Act, Article 6 terminates parental custody permanently and awards custody of the child to an authorized agency. The recommendation has been made that the two laws be consolidated into one statute, eliminating the distinction between "abandonment" and "permanent neglect". Would you be for or against the elimination of this distinction? State your reasons.

2. Do the "abandonment" and "permanent neglect" statutes protect the rights of all parties. If not, what changes would you recommend in their substantive provisions and/or procedural standards?

3. Should there be any changes in the laws governing the placement of children in care.

4. What problems have you had with the laws terminating parental rights on the grounds of mental illness (Social Services Law Sec. 384 Subd. 7).

5. In your experience, to what extent has the foster care review (Social Services Law, Sec. 392) resulted in the return of the child to the parent? What changes would you like to see in the Foster Care Review statute or rules and regulations?

6. In instances that you represent the parent, to what extent do you believe it is appropriate to take into account the best interests of the child? Do you believe that there is a conflict between the parent's rights and the child's interests?

7. Are changes needed in court procedures to protect the interest of your clients in termination proceedings? If so, what changes?

8. Many believe that the present state policy makes permanence the disposition of choice. Do you think this is a desirable policy? State your reasons.

NEW YORK CITY CHILD CARE AGENCIES

RESPONDING TO THE COMMISSION'S SURVEY

Agencies Visited

Angel Guardian Home
Brookwood Child Care
Cardinal McCloskey School and Home
Catholic Home Bureau
Children's Aid Society
Edwin Gould Services for Children
Greer Children's Services
Jewish Child Care Association
Little Flower Children's Services
Louise Wise Services
New York Foundling Hospital
St. Dominic's Home
Salvation Army Foster Home and Adoption Services
Spence-Chapin Services to Families and Children
Talbot Perkins Children's Services
Windham Child Care

Agencies Not Visited But Which Responded To The Survey

Abbott House
Astor Home for Children
Brooklyn Bureau of Community Service
Brooklyn Home for Children
Brooklyn Catholic Guardian Society
Cardinal Hayes Home for Children
Children's Village
Graham Home for Children
Inwood House
Lakeside School
Leake & Watts Children's Home
Lt. Joseph P. Kennedy, Jr. Home
Lutheran Community Services, Inc.
McMahon Memorial Shelter
Mission of the Immaculate Virgin
New York Catholic Guardian Society
Ottilie Home for Children
St. Agatha Home for Children
St. Cabrini Home, Inc.
St. Christopher's School
St. John's Residence for Boys
St. Joseph's Home of Peekskill
St. Mary of the Angels Home
St. Michael's Home
Sheltering Arms Children's Services
Speedwell Services for Children, Inc.

Agencies Which Responded That The Survey Was Not Applicable To Them

Argus Youth, Inc.
Berkshire Farm Center and Services for Youth
Big Brothers, Inc.
Divine Providence Shelter
Friendly Homes, Inc.
Green Chimneys Children's Services
Hebrew Children's Home
Jennie Clarkson Home for Children
Jewish Board of Guardians
Kennedy Child Study Center
Lexington School for the Deaf
Lincoln Hall
Madonna Heights School for Girls
Martin De Porres Group Home, Inc.
Mercy Home for Children
Ohel Children's Home
Pius XII School
Riverdale Children's Association
Rosalie Hall of Misericordia Hospital
Salvation Army Wayside Home School for Girls
St. Barnabas House
St. Germaine's Home
St. Mary's in-the-Field
St. Peter's School
Sisters of the Good Shepherd Residences
Villa Loretto School

Surrogate's Court
of the
County of New York

31 Chambers Street
New York, N.Y. 10007

Chambers of
S. Samuel Di Falco
Surrogate

February 4th, 1976

Hon. Joseph R. Pisani,
Chairman, The Temporary State
Commission On Child Welfare,
270 Broadway,
New York, N.Y. 10007

Dear Joe,

I am pleased to inform you that at the January 30th, 1976, meeting of the Executive Committee of the Surrogates' Court Association, of which I am Chairman, the enclosed proposed Memorandum was unanimously adopted and approved.

The Memorandum was again adopted and approved at the General Meeting of all of the Surrogates held on January 31st, 1976.

I have been authorized to inform you as to the position that the Surrogates are taking in the matter before your Committee for consideration.

If there is anything further that you feel that I can be of assistance, please feel free to call upon me.

With kindest personal regards and best wishes, I am

Sincerely yours,

S. SAMUEL DI FALCO,
Administrative Judge

SSDiF/fran
enc.

PROPOSED MEMORANDUM TO THE TEMPORARY COMMISSION ON CHILD WELFARE

The questions presented are:

(1) Whether Surrogate Court's jurisdiction should be expanded to include permanent neglect proceedings;

(2) whether Surrogate Court's jurisdiction should be expanded to include termination of parental rights proceedings based on mental illness and retardation;

(3) any comments on the abandonment law.

I have looked at the statutes involved in all of these and have outlined herein some comments.

As to permanent neglect proceedings (Family Court Act, Article 6): A permanently neglected child is one under 18 years of age, in the care of an agency, institution, authority or home, whose parent has failed for over a year since placement to plan for the child or maintain contact "although physically and financially able to do so" (emphasis my own). These proceedings provide for two hearing stages, a fact finding hearing and a dispositional hearing. At such hearings probation department reports are often used in evidence.

It is my opinion that at the present time the Surrogate's Court is not physically or financially geared to work in the manner that the Family Court does. The Family Court has probation services under §252 of the Family Court Act which we do not have. Under the Family Court Act §142 the Judge of that court may officially visit schools and institutions to see how the child behaves, etc. The Family Court Act §162 provides for special rooms for the children in the court when hearings are held. We are not physically geared for that.

Further, under the Family Court Act their "law guardians" who are appointed by the Appellate Division receive some reimbursement. In Surrogate's Court we appoint guardians who serve for no fee. It seems more equitable to have some reimbursement for attorneys when they are asked to do substantial work. If these proceedings were allowed to be brought in our court we would be forced to ask more and more lawyers to serve without compensation in a situation where a lawyer could be compensated if the same action had been brought in Family Court.

As to mental illness and mental retardation of parents, leading to commitment of destitute or dependent children (Social Services Law, §384, subd. 7), again the Family Court, now the only court expressly so empowered, is better set up to handle these cases. The Family Court is authorized by statute to appoint psychiatrists, to maintain psychiatric clinics, and to appoint counsel for indigents where necessary.

As to commitment of infants due to abandonment by their parents: The present system of concurrent jurisdiction creates problems. The Family Court has a different policy towards Orders of Publication than we have under SCPA (§309: four times) which creates confusion and is often inequitable. Perhaps publication ought to be equated by law in both courts. The Family Court personnel are more familiar with the practices and procedures of the agencies involved. Further as a practical note the Surrogate's Court is becoming so overloaded with these abandonment cases in some counties that with our present staff it cuts into our time to some degree.

Because there are many lawyers who prefer the Surrogate's Court for these proceedings, despite the extra work, it is my view that we should continue concurrent jurisdiction in these cases. Surrogates presumably can, in specific cases, dismiss without prejudice to Family Court proceedings, any case which appears to this court as one in an inconvenient forum (CPLR 327).